Supreme Court, U.S.
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No. 04-1365

IN THE

Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

Petitioners,

v.

HENTSCH HENCHOZ & CIE, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Utah

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PETITION FOR A WRIT OF CERTIORARI

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April 11, 2005

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QUESTIONS PRESENTED

1. Whether a court violates due process when it conditions a party's right to appeal on compliance with a condition, such as a large bond or a pretrial production order, with which the appellant is unable to comply, particularly when the court refuses even to consider the appellant's ability to comply with the condition at issue?

2. Whether a court violates equal protection principles when it conditions a party's right to appeal on compliance with a bond requirement with which the appellant is unable to comply, and without any consideration of the appellant's ability to comply?

PARTIES TO THE PROCEEDINGS BELOW

Capital Suisse, Inc., Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Limited, Zooley of Utah, Inc., Fernland Limited, Douglas P. Hoyt, and John Does 1-10 were petitioners in the Supreme Court for the State of Utah. Hentsch Henchoz & Cie was the respondent in the Supreme Court for the State of Utah.

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns any stock in any of the petitioners. No parent corporation owns any stock in any of the petitioners.

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IN THE

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No. ___

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

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PETITION FOR WRIT OF CERTIORARI

Capital Suisse, Inc., Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Limited, Zooley of Utah, Inc., Fernland Limited, and Philippe D. David Gubbay (collectively "Capital Suisse") respectfully request that this Court grant their petition for a writ of certiorari to review the decision and judgment of the Supreme Court of the State of Utah in *Hentsch Henchoz & Cie v. Gubbay*, 106 P.3d 718 (Utah 2005) (Appendix ("App.") 1a-14a; 18a)).

OPINIONS BELOW

The opinion and order of the Supreme Court of Utah declining to reach the merits of Capital Suisse's appeal, ordering Capital Suisse to post a bond for the unsatisfied portion of the judgment and to comply with the Utah District Court's discovery orders, and remanding to the Utah District Court for determination of compliance with such orders is published at 97 P.3d 1283 (Utah 2004). (App. 1a-14a). The Utah District Court's opinion finding that it lacked authority to determine whether Capital Suisse had made a bona fide attempt to comply with discovery requests and to post a bond, and concluding on that basis that Capital Suisse had not complied with the Utah Supreme Court's requirements, is unpublished. (App. 15a-17a). The Utah Supreme Court's *per curiam* opinion and summary order dismissing the appeal is published at 106 P.3d 718 (Utah 2005). (App. 18a).

JURISDICTION

The Supreme Court for the State of Utah entered its *per curiam* order dismissing Capital Suisse's appeal on January 11, 2005. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL PROVISIONS

This case involves Section One of the Fourteenth Amendment of the United States Constitution and Article Eight, Section Five of the Utah Constitution. Section One of the Fourteenth Amendment of the United States Constitution provides:

> Section 1: All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

> United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section Five of Article Eight of the Utah Constitution provides in pertinent part: "Except for matters filed originally with the Supreme Court, there shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." Utah Const. art. VIII, § 5.

STATEMENT OF THE CASE

This case presents an opportunity for the Court to resolve two separate conflicts regarding a court's ability, consistent with due process and equal protection principles, to deprive a party of its right to appeal based upon the party's inability to comply with court-imposed conditions on that right.

The first involves an issue presented, but addressed only in separate opinions by individual Justices, in *Texaco, Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987). It is whether a court violates due process when it imposes unattainable conditions on the exercise of a party's right to appeal.

Here, the Utah Supreme Court imposed arbitrary requirements on Capital Suisse's state-granted constitutional right to appeal, and ultimately dismissed Capital Suisse's appeal based on its inability to comply with such requirements. This approach, however, conflicts with the Second Circuit's decision in the *Pennzoil* case, which held

that the placement of arbitrary restrictions on a state-granted constitutional right to appeal can constitute a "confiscation of the judgment debtor's property without due process." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). The Utah Supreme Court's premature dismissal also is inconsistent with this Court's due process principles that require "fair opportunity to obtain an adjudication on the merits." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985).

The second issue, closely related to the first, is whether a court violates equal protection principles when it requires a party, as a condition of exercising its right to an appeal, to post a bond that the party cannot pay. In this case, the Utah Supreme Court dismissed Capital Suisse's appeal – without reaching its merits – because Capital Suisse failed to post a multi-million dollar bond. That decision squarely conflicts with state supreme court decisions in Oregon, Illinois and Alaska that have made plain that a State violates the equal protection clause when it conditions appellate access on the filing of a monetary bond. *Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004). Further, the Utah Supreme Court's dismissal violates this Court's decisions invalidating, on equal protection principles, state practices that impose arbitrary financial requirements on appellate review. *Lindsey v. Normet*, 405 U.S. 56 (1972).

Finally, the Utah Supreme Court's limitation and abrogation of the state-granted constitutional right to appeal has national significance for litigants across the country who are entitled, under numerous state constitutions, to an appeal of right.

A. The Utah District Court Proceeding

This case arises from investment subscription agreements between Hentsch Henchoz & Cie ("HH&C) and the "Capital Suisse Group of Companies." Capital Suisse Group of Companies was managed by Philippe D. David Gubbay and included the following entities: Capital Suisse, Inc., a company incorporated in Utah with its principal place of business in Salt Lake City, Capital Suisse, S.A., Capital Suisse Securities, Inc., Zooley Services Ltd., Zooley of Utah, Inc. and Fernland Ltd. In late 2000, HH&C, a large Swiss banking institution, executed several subscription agreements and invested almost $25 million of its clients' funds in an investment fund owned by Capital Suisse. (App. 1a-2a).

In May, 2001, HH&C's relationship with Capital Suisse fundamentally changed. Under Spanish law, any person may swear out a criminal complaint against another. A foreign national availed herself of that opportunity and swore out a complaint against Mr. Gubbay and the related Capital Suisse entities. Based on allegations only, a Spanish court issued successive "freezing" injunctions, prohibiting Capital Suisse from transferring or dissipating its assets. (App. 3a; 55a, ¶¶ 5-10; 58a-66a).

Shortly thereafter, HH&C informed Capital Suisse that it had lost confidence in Capital Suisse as a result of the Spanish proceeding, and thereupon asked for a return of the proceeds it had invested in Capital Suisse. Capital Suisse offered to provide HH&C valuable stock in a related company. But HH&C declined and instead caused the Spanish court to continue the "freezing" injunctions in its favor upon dismissal of the case brought by the foreign national. (App. 86a , ¶ 9). Armed with the injunction granted by the Spanish court, HH&C sought an order in the Utah State courts implementing the Spanish freeze order over

assets found in Utah. At no time, however, had any court, in Spain or in the United States, found that Capital Suisse had engaged in any improper activity.

The Utah District Court (the Honorable Ronald E. Nehring) initially declined HH&C's request for an injunction, advising instead that HH&C had to have pending an action before an injunction may be granted. In response to that ruling, on August 2, 2001, HH&C filed a Verified Complaint in the District Court for the Third Judicial District in and for Salt Lake County, Utah ("Utah District Court"), asserting that Capital Suisse had engaged in a scheme to defraud HH&C of the $25 million that HH&C had invested in the fund. In response, on August 15, 2001, Capital Suisse filed a motion to dismiss for lack of jurisdiction and improper venue in light of the parties' contracted-for forum selection clause in the subscription agreements. That clause mandated that all legal actions be brought in the British Virgin Islands.[1] In a minute order, the Utah District Court denied Capital Suisse's motion

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[1] Paragraph 12 of each Subscription Agreement provides

> We agree that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and ***we renounce to take any possible legal proceedings against the Funds under other jurisdictions***. However, we agree that the Funds may choose to start legal proceedings against us under any jurisdiction directly connected with the place of sending of the mail or any aspect of our file.

(App. 19a-21a) (emphasis added).

to dismiss and refused to apply the forum selection clause. (App. 4a-5a). Capital Suisse sought interlocutory review of the denial of its motion to dismiss. But the Utah Supreme Court declined to hear the interlocutory appeal. (App. 5a n.5).

During the litigation, and because of the outstanding judicial orders restricting its ability to employ its funds, Capital Suisse experienced extreme financial difficulties. As a result, Capital Suisse had to close its Utah offices and consolidate its businesses in Spain. (App. 86a, ¶ 10; 99a, ¶¶ 2, 3; 32a-33a). Moreover, because Capital Suisse could no longer afford office space in Utah, it moved its records to Spain – with full disclosure to the court and plaintiffs. (App. 86a, ¶ 10; 99a, ¶¶ 2, 3; 32a-33a). On March 25, 2002, in response to HH&C's objections to traveling to Spain to review relevant documents, the Utah District Court ordered Capital Suisse to produce documents in Salt Lake City, Utah. (App. 39a-40a).

Consistent with its earlier-filed motion to dismiss on both jurisdictional and venue grounds, and in light of its inability in any event to finance an effective defense under the circumstances, Capital Suisse elected not to participate in the District Court litigation in a manner that might constitute a waiver of its right to contest the Court's orders on either basis. Consequently, on April 1, 2002, Capital Suisse filed a notice of withdrawal of its answer, notifying the District Court that the "Capital Suisse Defendants do not believe that this Court has jurisdiction to allow HH&C to proceed in this Court and they lack the resources necessary to litigate against HH&C in several different countries and jurisdictions." (App. 43a-44a). For these reasons, the "Capital Suisse Defendants" informed the District Court that they "refuse[d] to acknowledge this litigation any further and have instructed their attorneys to take no further action on their behalf" in the

District Court. (App. 44a). The notice of withdrawal reiterated that the forum selection clause required the litigation to proceed in the British Virgin Islands. (App. 43a).

Relying on Capital Suisse's commitment not to participate further in the District Court proceedings, HH&C almost immediately thereafter filed a Motion for Summary Judgment. Consistent with its representations in its notice of withdrawal of its answer, Capital Suisse declined to respond. On July 17, 2002, the Utah District Court granted HH&C's unopposed Motion for Summary Judgment. (App. 45a).

B. The Utah District Court's Decision Granting Summary Judgment

In its order granting HH&C's unopposed Motion for Summary Judgment, the Utah District Court found that HH&C had satisfied its burden in proving its fraud and civil conspiracy claims against Capital Suisse. (App. 46a).

Absent a memorandum in opposition from Capital Suisse, the District Court agreed with each of HH&C's allegations, finding that Capital Suisse had improperly invoked the Fifth Amendment privilege, transferred documents to Spain during the litigation, and failed to comply with the Court's order to produce documents. (App. 46a-48a). The Court found that "this was not the conduct of legitimate business persons," (App. 48a), and entered judgment against Capital Suisse in the amount of $24,730,000 plus interest. (App. 51a-52a).

C. The Utah Supreme Court's Initial Decision

Exercising its constitutional right under Utah law, Capital Suisse filed a timely appeal of the Utah District Court's final judgment, once again contesting the Utah District Court's denial of Capital Suisse's motion to dismiss and refusal to

apply the forum selection clause. *See* Utah Const. art. VIII, § 5 ("[T]here shall be in all cases an appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause."). The District Court Judge, Judge Nehring, had by this time been appointed as an Associate Justice of the Utah Supreme Court. Presumably because he was the trial judge in the appealed-from matter, Justice Nehring recused himself from participation in the appeal. (App. 14a).

The Utah Supreme Court, in disregard of Capital Suisse's constitutional right to appeal, refused to address the merits of the case. (App. 14a). In its initial order declining to address the appeal, the Utah Supreme Court concluded that it had the authority to dismiss appeals from a "contumacious party." (App. 7a). Despite Capital Suisse's showing that it did not intentionally flout the Utah District Court's pretrial production order by moving its documents and equipment to Spain, the Utah Supreme Court cited the transfer of such documents and equipment as evidence demonstrating Capital Suisse's willful disobedience and obstructive tactics. (App. 10a).

The Utah Supreme Court acknowledged that "'[t]he right to appeal is a valuable and constitutional right'" that "'ought not to be denied except where it is clear the right has been lost or abandoned.'" (App. 12a) (quoting *Adamson v. Brockbank*, 185 P.2d 264, 268 (Utah 1947)). Nevertheless, the Court added a judicial gloss to the constitutional right to appeal by stating that it "is not absolute and the right may be forfeited, or a valid appeal may be dismissed, due to the acts or omissions of the appellant." *Id.* Applying this standard – not found in the Utah Constitution – the Utah Supreme Court refused to reach the merits of the case, instead ordering Capital Suisse to comply with the Utah District Court's discovery orders and to post a bond for the unsatisfied portion of the judgment. (App. 13a). The Utah Supreme Court

thereupon remanded to the Utah District Court with instructions to determine whether Capital Suisse had complied with such orders. *Id.*

D. The Utah District Court's Decision On Remand

On remand, Capital Suisse asked the Utah District Court to certify that it had satisfied the Utah Supreme Court's discovery and bond requirements. First, Capital Suisse noted that it had transferred from Spain to Utah all of the documents in its possession that it had removed during the litigation, and had made such documents available to HH&C for review.[2] Second, with respect to the bond requirement, Capital Suisse offered evidence that: (1) it lacked the financial resources to post a multi-million dollar bond; and (2) in all events it could not possibly post a bond because a Spanish Court had ordered its assets frozen. (App. 54a-103a). Because it had made a good faith effort to satisfy the Utah Supreme Court's additional jurisdictional requirements, Capital Suisse asked the District Court to permit its appeal to go forward by certifying compliance with its discovery and bond obligations.

Agreeing with arguments advanced by HH&C, the Utah District Court rejected Capital Suisse's request. It stated that its role in the certification process was "pretty limited," hinting at a ministerial role only. (App. 105a). It therefore declined to consider whether it was impossible for Capital

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[2] Capital Suisse explained that it was impossible to return to Utah *all* documents transferred to Spain because disgruntled employees had retaliated against Capital Suisse for lacking the resources to pay them by destroying and stealing certain documents and computer equipment. Despite this occurrence, Capital Suisse verified that it had returned to Utah all documents and computer equipment still in existence. (App. 86a-87a, ¶¶ 10-16; 99a, ¶¶ 2-4).

Suisse to comply fully with the Utah Supreme Court's discovery requirements and to post a bond to secure the unsatisfied portion of the judgment entered against it. (App. 105a) ("The fact that it may not now be possible to comply with the Court order does not mean that the order has been adequately complied with."). Having decided that it lacked authority to consider Capital Suisse's arguments of good faith and impossibility, the District Court summarily and mechanically concluded that Capital Suisse failed to comply fully with its discovery and bond obligations and advised Capital Suisse to take any remaining factual issues to the Utah Supreme Court. (App. 16a-17a; 107a).

E. The Utah Supreme Court's Final Decision

On November 4, 2004, Capital Suisse again attempted to exercise its constitutional right to appeal by asking the Utah Supreme Court to certify its compliance with discovery and bond obligations or, in the alternative, to order the Utah District Court: (1) to determine, in light of Capital Suisse's financial situation and the Spanish Court's freeze order, whether a bond was required; and (2) to conduct an evidentiary hearing to determine whether Capital Suisse had complied with its discovery obligations to the best of its ability. (App. 54a-103a).

Nevertheless, on January 11, 2005, the Utah Supreme Court entered a *per curiam* opinion stating that Petitioners "have failed to comply with this court's decision in the above-captioned matter" and ordering the appeal dismissed. (App. 18a). With two sentences, and without regard to Capital Suisse's efforts to comply, the Utah Supreme Court extinguished Capital Suisse's constitutional right to appeal.

REASONS FOR GRANTING THE WRIT

This petition should be granted because the Utah Supreme Court's decisions conflict with the decisions of one federal circuit court and three state supreme courts, and are otherwise inconsistent with this Court's principles governing due process and equal protection. As shown in Section I, the decision of the Utah Supreme Court conflicts with the Second Circuit decision that this Court reviewed, and reversed on other grounds, in the *Pennzoil* case, and violates this Court's due process principles. As shown in Section II, the decision below conflicts with state-court decisions in Alaska, Oregon and Illinois, and conflicts in principle with decisions of this Court, on the question of whether a court violates the equal protection clause by requiring a litigant, as a condition of exercising its right to appeal, to post a bond that it lacks the means to provide. Finally, Section III explains why the questions in this petition are of national importance.

I. THIS CASE PRESENTS AN IMPORTANT DUE PROCESS ISSUE WHICH THE COURT BELOW DECIDED ERRONEOUSLY AND IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

As shown below, the Utah Supreme Court's finding that it could extinguish a state-granted constitutional right to appeal by the imposition of impossible preconditions conflicts both with the Second Circuit's *Pennzoil* decision and with settled precedent of this Court.

A. The Utah Supreme Court's Decisions Conflict With the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986).

This petition presents an opportunity for this Court to resolve a conflict over whether a state court violates the due process clause of the Fourteenth Amendment when it strips a litigant of its right to appeal based on the litigant's inability to comply with arbitrary requirements.

In the *Pennzoil* case, the Second Circuit recognized that the placement of arbitrary restrictions on a state-granted constitutional right to appeal can effect a "confiscation of the judgment debtor's property without due process." *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). In *Pennzoil*, the Second Circuit affirmed a district court finding that a Texas state court violated plaintiff's due process rights by failing to reduce an $11 billion supersedeas bond, thereby preventing the plaintiff from exercising its state-granted constitutional right to appeal. *Id.*

In affirming the district court's judgment, the Second Circuit discussed the due process limitations on a court's authority to limit a litigant's appeal of right with arbitrary requirements. The Court of Appeals noted that "[f]ederal due process forbids the state from arbitrarily excluding certain parties from exercising [a state-granted constitutional right to appeal.]" *Id.* at 1154 (citing *Evitts v. Lucey*, 469 U.S. 387 (1985) and *Griffin v. Illinois*, 351 U.S. 12, 17-20 (1956)). The Court further concluded that "due process requires that, once the state has created a right of appeal, it must 'offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal.'" *Id.* (quoting *Evitts*, 469 U.S. at 405).

On this legal foundation, the Second Circuit determined that:

> [A]n inflexible requirement for impressment of a lien and denial of a stay of execution unless a supersedeas bond in the full amount of the judgment is posted can in some circumstances be irrational, unnecessary, and self-defeating, amounting to a confiscation of the judgment debtor's property without due process.

Id. at 1154; *see also Morgan Guar. Trust Co. of N.Y. v. Rep. of Palau*, 702 F. Supp. 60, 65 (S.D.N.Y. 1988) (same). In sum, the Second Circuit recognized due process limitations on a State court's authority to erect insurmountable barriers to exercising a state-granted constitutional right to appeal. *Pennzoil*, 784 F.2d at 1154.

Although this Court declined to address the due process issue on the merits in a subsequent appeal, four concurring Justices did reach the substantive issue with conflicting results. *See generally Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987) (overruling Second Circuit's decision on federalism abstention grounds and noting that "[w]e express no opinion on the claims Texaco has raised in this case against the Texas bond and lien provisions"). In his concurring opinion, Justice Brennan noted that while a cost requirement "may offend due process because it operates to foreclose a particular party's opportunity to be heard," the imposition of a multi-billion dollar supersedeas bond had not compromised Texaco's right to an appeal because Texaco could exercise such right "even if it were forced to file for Chapter 11." *Id.* at 22 (Brennan, J. concurring) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)); *see also id.* at 32 (Stevens, J. concurring) (concluding that a multi-billion dollar supersedeas bond would not violate due process because the failure to post a

supersedeas bond would not prevent Texaco from going forward with an appeal); *id.* at 23 (Marshall, J. concurring) (same).

In contrast, Justice Blackmun concluded in a concurring opinion that he "would not disturb the Court of Appeals' conclusion that Texaco's due process claim raised a 'fair groun[d] for litigation'" because arbitrary and irrational requirements can violate due process. *Id.* at 28-29 (Blackmun, J. concurring) (quoting *Pennzoil*, 784 F.2d at 1154). Thus, the Justices of this Court who addressed the due process issue were sharply divided on the question presented here.

Charting its own path in this case, the Utah Supreme Court concluded that it had the authority to impose unachievable threshold requirements on Capital Suisse before it could pursue its state-granted constitutional right to appeal. Like the Texas constitution, the Utah Constitution guarantees every litigant an unrestrained "appeal of right from the court of original jurisdiction to a court with appellate jurisdiction over the cause." Utah Const. art. VIII, § 5. The Utah Supreme Court, however, concluded that it could restrict Capital Suisse's constitutional right to appeal, first, by imposing unattainable restrictions, and then by refusing even to consider whether such restrictions were impossible to achieve. (App. 1a-14a; 18a). *Accord Price v. Philip Morris, Inc.*, 793 N.E.2d 942, 945 (Ill. App. Ct. 2003) (concluding that court's refusal to reduce a $12 billion supersedeas bond does not violate constitutional principles).

In the Second Circuit, such inflexible requirements would not comport with the due process requirement to provide a litigant with "a fair opportunity to obtain an adjudication on the merits of [its] appeal." *Pennzoil*, 784 F.2d at 1154. Thus, there is an inherent conflict between the Utah Supreme

Court's decision in this case and the Second Circuit's *Pennzoil* decision.

B. The Utah Supreme Court Exercised Its Inherent Authority In Conflict With Established Supreme Court Principles Governing Due Process.

The Utah Supreme Court's decision not only conflicts with the Second Circuit's *Pennzoil* decision, but also contradicts established decisions of this Court

1. It is well established that the Fourteenth Amendment does not require a State to provide for appellate review. *Griffin v. Illinois*, 351 U.S. 12, 18 (1956); *District of Columbia v. Clawans*, 300 U.S. 617, 627 (1937). This Court has nonetheless concluded that it is "fundamental" that once a state establishes avenues of appellate review, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Griffin*, 351 U.S. at 18.

Starting with *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Douglas v. California*, 372 U.S. 353 (1963), this Court has struck state appellate practices that arbitrarily excluded certain parties from exercising a state-granted right to appeal. *See Griffin*, 351 U.S. at 18 (concluding that dismissal of appeal based on ability to afford a transcript violated due process); *Douglas*, 372 U.S. at 356 (procedure whereby indigent defendant must demonstrate merit of case before obtaining counsel on appeal does not comport with "fair procedure."); *see also Smith v. Robbins*, 528 U.S. 259, 277 (2000) (noting that the *Griffin* and *Douglas* cases derive support from the due process clause).

Based on *Griffin* and *Douglas*, this Court has concluded that, where a state decides to establish a constitutional appeal

of right, due process requires the state "to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal." *Evitts v. Lucey*, 469 U.S. 387, 405 (1985) ("In cases like *Griffin* and *Douglas*, due process concerns were involved because the States involved had set up a system of appeals as of right but had refused to offer each defendant a fair opportunity to obtain an adjudication on the merits of his appeal."). Furthermore, the imposition of an "impossible" condition on the exercise of a right to appeal implicates due process concerns. *Cf. Boddie v. Conn.*, 401 U.S. 371, 379-81 (1971) (concluding that a state statute requiring fees to bring a civil action for divorce – regardless of ability to pay – violated the Due Process Clause of the Fourteenth Amendment.).

2. For the past century, this Court also has established due process limitations on a court's "inherent authority" to dismiss actions without addressing the merits. *See Hovey v. Elliott*, 167 U.S. 409 (1897) (concluding that defendant's due process rights were denied after a state court struck his answer for failing to obey a court's order to pay fee to court's registry); *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-51 (1909) (concluding that state court acted in accordance with due process when it dismissed an answer against a defendant who failed to demonstrate a bona fide effort to comply with court's order to produce documents); *Degen v. United States*, 517 U.S. 820, 822-24 (1996) (determining that court order striking filings of claimant in forfeiture suit for failing to appear in a related criminal prosecution violated due process).[3]

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[3] This case is not controlled by the majority opinion in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954). There, this Court concluded that a State appellate court comports with due process when it dismisses an appeal from a petitioner in contempt for failing to comply with the lower court's order to deliver $298,000 bonds to the court's receiver for safekeeping pending the appeal. But that decision does

This Court has further concluded that due process requires a court to determine whether a party has made a good faith effort to comply with court orders before exercising its authority to dismiss the action without addressing the merits. *Hammond*, 212 U.S. at 350 (noting that all state had required "was a bona fide effort to comply with an order . . . and therefore any reasonable showing of an inability to comply would have satisfied the requirements . . . of the statute and the order."); *Societe Internationale Pour Participations Industrielles Et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 209 (1958) (citing *Hammond* and noting that "constitutional limitations" placed on the power of the courts to dismiss actions without reaching the merits required that a court cannot dismiss an action for failure to comply with a court order "when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.").[4]

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not control the outcome of this case for two reasons. First, unlike Capital Suisse, the *National Union* petitioner did not make a good faith effort to comply with the lower court's bond order. *See National Union*, 348 U.S. at 44 (noting that petitioner was allowed 15 days to purge itself of the contempt). Second, the state of Washington, unlike Utah, does not provide a constitutional right to appeal in civil cases. *See Housing Authority of King County v. Saylors*, 557 P.2d 321, 326 (Wash. 1976) (explaining that the constitution expressly gives a right of appeal in all criminal, but not civil, cases). Accordingly, the question presented in this case provides this Court with the opportunity to address a new, but related question: In a State that provides a constitutional right to appeal from adverse lower court decisions, may the State appellate courts, consistent with due process, dismiss an appeal because of a party's inability, despite good faith efforts, to post a multi-million dollar bond and to comply with a pretrial production order?

[4] This Court has considered whether a state court violates due process by dismissing an appeal where the party seeking relief is a fugitive while the matter is pending. *See Allen v. Georgia*, 166 U.S. 138 (1897); *Estelle v. Dorrough*, 420 U.S. 534 (1975). Relying on this due process authority, this Court has further considered whether a federal appellate court can,

3. In this case, the Utah Supreme Court violated the due process clause by arbitrarily denying Capital Suisse's state-granted constitutional right to appeal by failing to afford Capital Suisse a "fair opportunity" to obtain a "meaningful appeal." First, the Utah Supreme Court legislated additional restrictions onto Capital Suisse's constitutional right to appeal by withholding judgment until Capital Suisse complied with production orders and posted a multi-million dollar bond, neither of which was relevant to the issues raised in Capital Suisse's appeal. The Utah Supreme Court's new restrictions were not based on a constitutional or statutory provision or court rule. Indeed, the Utah Supreme Court noted that it had "not addressed whether it may dismiss a civil appeal when the appellant disobeys the orders of the district court." (App. 6a).

Second, after erecting barriers to petitioners' ability to exercise their right to appeal, the Utah Supreme Court summarily dismissed Capital Suisse's appeal without considering Capital Suisse's claim (and supporting evidence) that it: (1) satisfied its discovery obligations to the extent possible; (2) lacked the financial resources to satisfy the bond requirement; and (3) was otherwise prohibited from

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consistent with due process principles, invoke its inherent authority to dismiss an appeal after the appellant "flouted" the authority of a lower court. *Oretega-Rodriguez v. U.S.*, 507 U.S. 234, 246 (1993). In *Ortega-Rodriguez*, this Court stated that "[w]e cannot accept an expansion of this reasoning that would allow an appellate court to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system, even where such conduct has no connection to the course of appellate proceedings." *Id.; see also Degen*, 517 U.S. at 824-26 (noting *Ortega-Rodriguez*'s constitutional underpinnings and concluding, in similar fashion, that striking plaintiff's claims for flouting the authority of another court in a related criminal case violates due process). The Utah Supreme Court violated these due process principles by invoking its purported "inherent authority" to dismiss Capital Suisse's appeal based solely on Capital Suisse's alleged noncompliance with discovery orders of the Utah District Court. (App. 6a-14a; 18a).

complying with the bond obligation by the Spanish court's freeze order. (App. 18a). By refusing even to consider Capital Suisse's arguments that it was *incapable* of complying with its discovery and bond obligations, the Utah Supreme Court violated this Court's principles governing due process, which provide a litigant with a "fair opportunity" for a "meaningful appeal." Accordingly, the Court's imposition of impossible conditions on Capital Suisse's constitutional right to appeal violated this Court's well-established principles governing due process.

II. THE UTAH SUPREME COURT'S DECISIONS CONFLICT WITH DECISIONS OF THE OREGON, ILLINOIS AND ALASKA SUPREME COURTS AND WITH EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT.

The decisions below also conflict with decisions of three state supreme courts, not to mention this Court's equal protection precedent.

A. The Utah Supreme Court's Decisions Conflict With State Supreme Court Decisions in Oregon, Illinois and Alaska.

The Utah Supreme Court not only required Capital Suisse to pay a multi-million dollar bond to exercise its state-granted constitutional right to appeal, but it refused even to consider whether Capital Suisse possessed the financial resources to post such a bond. (App. 18a). Contrary to the Utah Supreme Court's decision in this case, the Supreme Courts of Alaska, Illinois and Oregon have concluded that a State violates the equal protection clause when it conditions appellate access on the filing of a cost or appellate bond. *See Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280

N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004).

In *Barber*, the Oregon Supreme Court considered whether an Oregon statute requiring an appellant in a civil habeas case to post an appellate bond violates the equal protection clause by denying an appellant his statutory right to appeal. Based on this Court's *Griffin* decision, the Oregon Supreme Court concluded that the application of the Oregon statute to require an indigent plaintiff to post an appellate bond prior to instituting an appeal violated the equal protection clause. *Barber*, 298 P.2d at 988-90.

Similarly, in *Jack Spring*, the Supreme Court of Illinois cited *Griffin* to support its conclusion that a statute that required the furnishing of a bond as a prerequisite to prosecuting an appeal violated the Fourteenth Amendment. *Jack Spring*, 280 N.E.2d at 211.

Most recently, the Supreme Court of Alaska reversed a superior court's decision to dismiss an appeal from an arbitration proceeding because the plaintiff failed to post a cost bond. *Gilbert*, 2004 WL 1701109 at *2-3. The Alaska Supreme Court concluded that – at the very least – the superior court had an obligation to consider whether the appellant satisfied the statutory requirements for proceeding *in forma pauperis* before dismissing the appeal based on her failure to pay the bond. *Id.*

In contrast to the *Barber*, *Jack Spring* and *Gilbert* decisions, the Utah Supreme Court impermissibly set Capital Suisse up to fail, conditioning its appellate access on the filing of a multi-million dollar bond and then utterly refusing to consider whether Capital Suisse had the financial ability to post such a bond. (App. 13a; 18a). Accordingly, this case presents the opportunity for this Court to resolve a conflict

among several of the States' highest courts regarding whether a State violates the equal protection clause by placing an ad hoc financial limitation on a right to appeal.

B. The Utah Supreme Court's Decisions Conflict With Equal Protection Principles Established By This Court.

The Utah Supreme Court's decisions not only conflict with decisions of the Oregon, Illinois and Alaska Supreme Courts, but also contradict this Court's equal protection principles. This Court has noted that when a State establishes a constitutional right to an appeal, "it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause." *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin*, 351 U.S. at 18.

Starting with *Griffin*, 351 U.S. at 18, this Court has invalidated various practices on equal protection grounds because they limited appellate review through arbitrary and capricious financial requirements. *See Griffin*, 351 U.S. at 18-19 (declaring unconstitutional an Illinois rule requiring criminal defendants to pay for a transcript prior to receiving appellate review because it "cut off appeal rights for indigents while leaving avenues of appeal open for other defendants"); *Mayer v. Chicago*, 404 U.S. 189, 197 (1971) (declaring a "flat prohibition" against "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay"); *Lindsey v. Normet*, 405 U.S. at 77-78 (emphasizing that the right to appeal cannot be arbitrarily and capriciously denied and concluding the imposition of a double bond requirement failed equal protection standards because it raised a substantial barrier to appeal for a particular class of litigants – tenants facing eviction – a barrier faced by no other litigant in Oregon); *Smith v. Bennett*, 365 U.S. 708, 709-12 (1961)

(State violated equal protection clause by dismissing petition for writ of habeas corpus and subsequent appeal where indigent litigant could not pay $4 filing fee).

In contravention of the principle invoked in these authorities, the Utah Supreme Court improperly imposed a multi-million dollar price tag on Capital Suisse's constitutional right to appeal -- a price it was unable to pay. Capital Suisse had no ability to satisfy this requirement, and thus the Utah Supreme Court's finding that Capital Suisse "forfeited" its constitutional right without so much as considering the willfulness of Capital Suisse's failure runs afoul of this Court's precedent.

III. THE QUESTION PRESENTED RAISES AN ISSUE OF SIGNIFICANT NATIONAL IMPORTANCE.

Finally, there can be no question that the two questions presented here are of national significance. The right denied by the Utah Supreme Court – the right to appeal a decision of a state trial court – is found in state constitutions across the country. *See* Utah Const. art. VIII, § 5 ("[T]here shall be in all cases an appeal of right from the court of original jurisdiction."); *see also* Ill. Const. art. VI, § 6 ("Appeals from final judgments of a Circuit Court are a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located except in cases appealable directly to the Supreme Court . . ."); Pa. Const. Art. V, § 9 ("There shall be a right of appeal in all cases to a court of record from a court not of record."); Ky. Const. § 115 ("In all cases, civil and criminal, there shall be allowed as a matter of right at least on appeal to another court . . ."); *Pennzoil*, 784 F.2d at 1154 ("The Texas constitution grants a right of appeal to all civil and criminal litigants."). If the Utah Supreme Court can extinguish that right based upon the imposition of conditions

with which a party cannot comply, then any federal or state court can do the same. Thus, the issues presented here are of truly nationwide importance.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

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April 11, 2005

APPENDIX A

SUPREME COURT OF UTAH

No. 20020683

HENTSCH HENCHOZ & CIE,
Plaintiff and Appellee,

v.

PHILIPPE D. DAVID GUBBAY; CAPITAL SUISSE, S.A.; CAPITAL SUISSE SECURITIES, INC.; CAPITAL SUISSE, INC.; ZOOLEY SERVICES LIMITED; ZOOLEY OF UTAH, INC.; FERNLAND LIMITED; DOUGLAS P. HOYT; and JOHN DOES 1-10,
Defendants and Appellants.

Aug. 6, 2004

DURRANT, *Justice*:

Appellants contest the district court's denial of their motion to dismiss, arguing that venue is not proper in Utah due to a forum selection clause that provides for all actions to be brought in the British Virgin Islands. In light of appellants' wilful defiance of the district court's orders below, we refuse to consider the merits of the appeal at this time. Instead, we will stay the appeal in order to allow appellants time in which to comply with our instructions as outlined in this opinion. If appellants fail to comply, the appeal will be dismissed.

BACKGROUND

The events giving rise to this litigation began in late 2000 when appellee Hentsch Henchoz & Cie ("HH & C"), a Swiss banking institution with offices around the world, was approached about a purported investment opportunity. HH & C was contacted by Philippe D. David Gubbay ("Gubbay"), the

"Managing Director, CEO and President" of the "Capital Suisse Group of Companies," an organization that allegedly operated a highly successful "Mutual Fund for the Professional Investor."

The Capital Suisse Group of Companies, purportedly "a worldwide financial services corporation," included the following entities: Capital Suisse, S.A. ("the Fund"), which was incorporated in the British Virgin Islands and had offices in Marbella, Spain; Capital Suisse, Inc., a Utah corporation, which had its principal place of business in Salt Lake City and was the purported administrator and registrar of the Fund; Capital Suisse Securities, Inc., the principal custodian of the Fund with its principal place of business in San Rafael, California; Zooley Services Ltd., a West Indies corporation and professed investment adviser for the Fund; Zooley of Utah, Inc., a Utah corporation that allegedly provided financial services for Zooley Services; and Fernland Ltd., a West Indies corporation and, ostensibly, the sole director of the Fund. Gubbay corresponded on behalf of the Fund as a director of Fernland. (Gubbay and the Capital Suisse Group of Companies will be collectively referred to herein as "Capital Suisse.") Capital Suisse, Inc., and Zooley of Utah, Inc. maintained bank accounts at Wells Fargo Bank and Zions First National Bank in Salt Lake City, Utah.

In November of 2000, Gubbay provided HH & C with a confidential prospectus along with other materials that portrayed the Fund as being very successful and highly profitable. Relying on these and other representations, HH & C wired a total of nearly $25 million to Capital Suisse. Each of HH & C's seven wire transfers was accompanied by a "Subscription Agreement" that purported to set forth the number of shares purchased by HH & C. In addition, each Subscription Agreement contained a forum selection clause, providing that any legal proceedings against the Fund would be brought only in the British Virgin Islands.

Throughout the first quarter of 2001, the Capital Suisse website represented that the Fund was steadily gaining in value. However, after a routine internal review, HH & C became suspicious. Beginning in April 2001, HH & C began a series of attempts to redeem its shares. In the course of these unsuccessful attempts, HH & C discovered that Gubbay was a convicted embezzler and had been sentenced to a term of imprisonment and to deportation from Switzerland for seven years. HH & C also learned of, and subsequently participated in, an ongoing criminal proceeding against Capital Suisse brought by another defrauded investor in Marbella, Spain. In defending against HH & C's claims before the Spanish court, Capital Suisse asserted that jurisdiction was not proper in Spain because HH & C did not have commercial relations with Capital Suisse in Spain, but only with Capital Suisse, Inc., located in Salt Lake City, Utah. At the conclusion of the Spanish proceeding, the Spanish Criminal Court issued an order freezing the Capital Suisse accounts at Wells Fargo Bank and Zions First National Bank in Salt Lake City, Utah (the "Spanish Order").

On June 21, 2001, HH & C filed a petition in Utah's Third District Court to enforce the Spanish Order. The district court scheduled an evidentiary hearing, and HH & C began serving subpoenas on the banks. Capital Suisse moved to quash the subpoenas or, alternatively, for a protective order preventing disclosure to third parties of any information gained from the bank accounts. Capital Suisse also filed a motion in limine, seeking to exclude any evidence relating to the bank records at the scheduled evidentiary hearing. On July 27, 2001, in its order on the motion to quash, the district court determined that HH & C was entitled to review the bank account balances for the dates of June 26th and July 25th pending the evidentiary hearing. Upon reviewing the account balances

pursuant to the district court's order, HH & C learned that the accounts had been severely depleted.[1]

In the face of the dissipation of the bank accounts, and Capital Suisse's refusal to comply with HH & C's document requests, HH & C filed a verified complaint in the district court on August 2, 2001, asserting claims for fraud, civil conspiracy, breach of fiduciary duty, breach of contract, and conversion.[2] At that time, HH & C also filed a motion seeking a temporary restraining order and prejudgment writ of attachment of the bank accounts, in addition to a motion for expedited discovery with interrogatories and document requests to Capital Suisse and subpoenas to Zions and Wells Fargo. At a hearing on the motions, the district court questioned counsel for Capital Suisse as to the marked depletion in the bank accounts. Finding counsel's answers unsatisfactory, the court ordered counsel to be prepared the following week to disclose what had happened to the funds.[3] The court then granted HH & C's motions and entered a temporary restraining order freezing the Zions and Wells Fargo accounts.

On August 15, 2001, Capital Suisse requested a stay pending interlocutory appeal of the order granting expedited discovery.[4] Capital Suisse also filed a motion to dismiss based on lack of jurisdiction and improper venue due, in part, to the existence of the forum selection clause contained in the Sub-

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[1] For instance, the Zions account had gone from a balance of $2,207,006.94 on June 26th to a balance of $804,468.31 on July 25th.

[2] This action was later consolidated with the original petition to enforce the Spanish Order.

[3] Although counsel agreed to do so, it does not appear that Capital Suisse ever complied with this request.

[4] Specifically, Capital Suisse sought to stay any discovery of the bank accounts prior to "dispositive motions to dismiss being heard in [the] matter." We denied Capital Suisse's petition for interlocutory appeal on this matter on October 2, 2001.

scription Agreements. In a minute entry dated October 11, 2001, the district court denied Capital Suisse's motion to dismiss. The court determined that, since the forum selection clause was unfair and the entire agreement was pervaded by fraud, the forum selection clause could be disregarded. It is this ruling that is the subject of this appeal.

The district court denied Capital Suisse's subsequent motion to stay the litigation pending interlocutory appeal of the denial of the motion to dismiss[5] and ordered Capital Suisse to comply with HH & C's outstanding discovery requests, which it noted had been outstanding for "some time." In response, Capital Suisse invoked the Fifth Amendment privilege against self-incrimination and otherwise refused to answer. Capital Suisse's privilege claim was also denied by the district court, and the court again ordered Capital Suisse to answer the interrogatories and ordered all of the Capital Suisse defendants to answer the complaint. Capital Suisse filed an answer to the verified complaint on February 28, 2002.

At some point during the course of this litigation, in defiance of the district court's orders requiring Capital Suisse to comply with HH & C's discovery requests, Capital Suisse shipped all of its documents, records, and computer hard drives from Utah to Spain. Upon discovering that the documents and other items were no longer in Utah, the district court ordered their return. Soon thereafter on April 1, 2002, Capital Suisse filed a notice of withdrawal of answer, stating that it "refuse[d] to acknowledge [the] litigation any further" because, pursuant to the forum selection clause in the parties' agreement, jurisdiction was only proper in the British Virgin Islands. Capital Suisse's counsel also filed a motion to withdraw, indicating that Capital Suisse "do[es] not recognize the

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[5] This court denied interlocutory review by an order dated January 3, 2002.

jurisdiction of the United States over the dispute." Counsel also stated that "as officers of the [c]ourt" they had been placed in a "conflict of interest situation" in light of the outstanding orders of the district court and Capital Suisse's "refus[al] to comply or otherwise participate any further in th[e] action."

HH & C then moved for summary judgment on three of its claims, which was unopposed by Capital Suisse. The district court granted the motion, concluding that Capital Suisse had defrauded HH & C "by acting in concert to create the appearance of a legitimate investment opportunity" that was "nothing more than a ruse to defraud innocent investors." The court entered judgment against Capital Suisse in the amount of $24,730,000 plus interest. Capital Suisse filed this appeal on August 15, 2002, contesting only the district court's denial of its motion to dismiss based on the forum selection clause. We have jurisdiction pursuant to Utah Code section 78-2-2(3)(j) (2002).

ANALYSIS

In its argument on appeal, HH & C urges this court to dismiss Capital Suisse's appeal without considering the merits because Capital Suisse has "repeatedly and willfully disobeyed [the district court's] orders . . . , destroyed evidence, and refused to recognize the jurisdiction of the Utah courts." To date, this court has not addressed whether it may dismiss a civil appeal when the appellant disobeys the orders of the district court in the same action. The Utah Court of Appeals, however, has discussed its authority to dismiss appeals from contemptuous appellants on several occasions. In *D'Aston v. D'Aston*, 790 P.2d 590 (Utah Ct.App.1990), the first Utah case to address the issue, the appellant challenged a divorce decree entered by the trial court. *Id.* at 591. The court of appeals determined that it could dismiss the appeal because the appellant had failed to pay the amount due her former husband, had failed to post an ordered supersedeas bond, and

had been adjudged in contempt by the trial court after "purposefully hiding herself from the jurisdiction of the [c]ourt and from service." *Id.* at 592-93.

In examining the procedures for dismissal followed by other jurisdictions, the court of appeals noted that there are at least three ways that an appellate court can deal with a contumacious party: (1) the court can dismiss the appeal without allowing the party an opportunity to bring itself into compliance with the trial court's order; (2) the court can allow the party a fixed time to comply with the trial court's order before dismissing the appeal; or (3) the court may, in its discretion, fashion a remedy that is appropriate to the facts and circumstances of the particular case. *Id.* at 593-94 (listing cases); *see also Von Hake v. Thomas*, 881, P.2d 895, 897-98 (Utah Ct.App.1994) ("*Von Hake II*") (discussing *D'Aston*). In deciding to allow the appellant in *D'Aston* thirty days to "bring herself within the process of the trial court" before her appeal would be dismissed, the court of appeals emphasized that its approach did not deny the appellant her constitutional right to appeal under *article VIII, section 5 of the Utah Constitution*. *Id.* at 594-95. Rather, the court merely "insist[ed] [that] she . . . submit herself to the jurisdiction of the trial court and satisfy that court's concerns before she [would be allowed to] exercise that right." *Id.*

Similarly, in *Von Hake v. Thomas*, 858 P.2d 193 (Utah Ct. App.1993) ("*Von Hake I*"), the court of appeals dismissed the appeal of a litigant who had been adjudged in contempt by the trial court for failure to comply with discovery orders and the use of "improper and dilatory tactics to frustrate [trial court] orders and to avoid appearing in court." *Id.* at 193-94. The court determined that because the appellant was currently serving a five-year term of imprisonment in California for tax fraud, "a provisional dismissal, conditioned upon [his] failure to physically present himself to the trial court within thirty days, would be an exercise in futility." *Id.* at 197. Therefore,

the court "dispense[d] with the formality of a thirty-day grace period" and dismissed the appeal outright. *Id.*

On remand from this court, the court of appeals revisited the necessity of a grace period and concluded that *D'Aston* did not require a mandatory grace period before dismissal, but rather that "*D'Aston* affirm[ed] the court's discretionary authority to dismiss the appeals of contumacious litigants under terms which are fair and just given the circumstances of a particular case." *Von Hake II*, 881 P.2d at 897-98. Therefore, the court again held that the appeal should be dismissed outright, but noted that the dismissal was "without prejudice, subject to reinstatement on reasonable terms and conditions" specified by the court. *Id.* at 898; *see also Cummings v. Cummings*, 1999 UT App 356, ¶ 11, 993, P.2d 248 (holding that because appellant had been adjudged in contempt and his defiance of court orders had led to the dissipation of the marital assets, the court could, in its discretion, dismiss the appeal and "condition reinstatement of th[e] appeal upon appellant's submission to th[e] court of proof that he ha[d] satisfied the judgments held by appellee").

In light of these cases and myriad authorities from other jurisdictions,[6] we conclude that this court, in its discretion, may dismiss the appeals of appellants who have wilfully disobeyed an order of a lower court in the same action. We agree with the approach adopted by the court of appeals that allows the reviewing appellate court to exercise its discretionary authority by fashioning a remedy that is fair and just under the circumstances, taking into account the facts of

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[6] *See, e.g., Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697 (1962); *Alioto Fish Co., Ltd. v. Alioto*, 27 Cal.App.4th 1669, 34 Cal.Rptr.2d 244 (1994); *Tobin v. Casaus*, 128 Cal.App.2d 588, 275 P.2d 792 (1954); *Schmidt v. Schmidt*, 610 A.2d 1374 (Del.1992); *Keidaish v. Smith*, 400 So.2d 90 (Fla.Dist.Ct. App.1981); *Prevenas v. Prevenas*, 193 Neb. 399, 227 N.W.2d 29 (1975); *DeMauro v. DeMauro*, 147 N.H. 478, 794 A.2d 112 (2002); *Hopp v. James*, 470 S.W.2d 716 (Tex.Civ.App. 1971).

the particular case. Such authority is indispensable since it would "violate[ ] the principles of justice to allow a party who flaunts the orders of the courts to seek judicial assistance" on appeal. *D'Aston*, 790 P.2d at 593 (citing *Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962); *Rude v. Rude*, 153 Cal.App.2d 243, 314 P.2d 226, 230 (1957); *Greenwood v. Greenwood*, 191 Conn. 309, 464 A.2d 771, 773 (1983); *Strange v. Strange*, 464 S.W.24 216, 219 (Tex.Civ.App.1970) (per curiam)).

Additionally, although in the court of appeals' cases discussed above the appellants had been formally cited for contempt, we conclude that dismissal of appeals from disobedient parties does not require a formal finding of contempt. In so concluding, we join with those jurisdictions that maintain that "[t]he principle permitting [a] court to stay or dismiss an appeal does not require a formal judgment of civil contempt. It is based upon fundamental equity and is not to be frustrated by technicalities, such as the absence of a formal citation and judgment of contempt." *Alioto Fish Co., Ltd. v. Alioto*, 27 Cal.App.4th 1669, 34 Cal.Rptr.2d 244, 251 (1994) (quotations omitted) (finding that appellant's "wilful disobedience [and] obstructive tactics" were sufficient to warrant dismissal of the appeal (quotations omitted)); *see also Stewart*, 372 P.2d at 699-700 (noting that a number of jurisdictions allow appellate discretion to dismiss for violations of trial court orders "whether or not the disobedient appellants have been formally adjudicated in contempt of court"); *Keidaish v. Smith*, 400 So.2d 90, 91 (Fla. Dist. Ct. App. 1981) dismissing appeal even where there was no formal finding of contempt because appellant had violated temporary injunction by transferring valuable property and money to various parties and had fled the jurisdiction).

In the present case, Capital Suisse's defiance of district court orders is clearly sufficient to warrant dismissal of the appeal. Though not formally adjudged in contempt, Capital

Suisse's wilful disobedience would certainly have been adequate to support an order of contempt had Capital Suisse not absented itself from the litigation. Capital Suisse repeatedly refused to comply with discovery requests from HH & C and went to extreme lengths to prevent access to the Zions and Wells Fargo bank accounts. Upon being ordered by the district court to comply with discovery, Capital Suisse shipped all of its documents, records, and computer hard drives from Utah to Spain. On the heels of this insubordination, upon being ordered to return the awol documents and other evidence, Capital Suisse abruptly withdrew from the litigation, claiming that the district court had no jurisdiction over it.

Capital Suisse argues that it did not wilfully disobey court orders, but that it "simply declined to participate substantively in the proceedings" after the district court denied its motion to dismiss for lack of venue, at which point it was "convinced that the [district] court had abused its discretion by wrongly concluding that venue was proper in Utah." We emphasize, however, that "[t]he processes of the appellate court are [only] available to one who recognizes his responsibility to obey court orders while they remain in effect," and "a litigant is not free to determine to what extent he will comply with the law." *Schmidt v. Schmidt*, 610 A.2d 1374, 1377 (Del.1992).

Further, we observe that Capital Suisse does not contend on appeal that the district court lacked jurisdiction or otherwise lacked authority to enter orders in this case. Rather, Capital Suisse argues only that venue is improper in Utah due to the contractual forum selection clause. Early case law from this court confirms that when a court "has legally acquired jurisdiction of subject-matter and of the parties, [its] jurisdiction . . . is not affected every time [it] thereafter misconstrues, misconceives, or misapplies a statute not involving subject-matter, jurisdiction, or parties, but mere procedure."

State v. Morgan, 44 Utah 224, 230, 140 P. 218, 221 (1914). Error with regard to a determination of proper venue is "simply [an] error[ ] of law" and does not oust the jurisdiction of a court that has properly acquired jurisdiction over the subject matter and the parties to an action. *Morgan*, 44 Utah at 229, 140 P. at 220. While a court's judgment in this regard may be voidable, the error does not go "to the power of the court itself," and "its judgment is not void." *Id.* (internal quotations omitted); *see also Floor v. Mitchell*, 86 Utah 203, 212, 41 P.2d 281, 284-85 (1935) ("The court had jurisdiction of subject-matter. It also by process served had jurisdiction of the person of the defendants. The action here, thus, was not a question of jurisdiction either of subject-matter or of person. It was one merely of venue.").

It is clear that the district court in this case had both subject-matter jurisdiction over the case and personal jurisdiction over the defendants. If the presence of Capital Suisse subsidiaries and bank accounts in Utah alone were not enough to grant personal jurisdiction, then certainly Capital Suisse's prolonged participation in the litigation prior to withdrawal would have been sufficient. Therefore, even if we were to assume that the district court's determination with respect to venue was in error, the district court nevertheless had the authority to enter valid and enforceable orders in this case, and Capital Suisse was obliged to comply.

Furthermore, while a party may permissibly withdraw from litigation and allow a default or summary judgment to be entered against it, a party may not wilfully engage in affirmative acts that frustrate district court orders. Contrary to Capital Suisse's assertions, Capital Suisse did not "simply decline [ ] to participate substantively in the proceedings" in this case. Rather, Capital Suisse defied district court orders by shipping its documents out of state, thwarting HH & C's efforts to trace its assets, and deliberately frustrating the litigation. Moreover, the orders of the district court were both received

and violated by Capital Suisse while Capital Suisse was still meaningfully participating in the litigation.

Capital Suisse also argues that it has a "substantive right to appeal" the district court's denial of its motion to dismiss for improper venue and that it has "'a legal right to insist that the action proceed in the proper venue.'" *See State v. Sosa*, 598 P.2d 342, 344 (Utah 1979), (further quotations omitted). We agree that "[t]he right to appeal is a valuable and constitutional right and ought not to be denied except where it is clear the right has been lost or abandoned." *Adamson v. Brockbank*, 112 Utah 52, 60, 185 P.2d 264, 268 (1947); see also Utah Const. art. VIII, § 5. However, the right to appeal is not absolute and the right may be forfeited, or a valid appeal may be dismissed, due to the acts or omissions of the appellant, including, for example, infractions of the rules of appellate procedure. *See, e.g.*, Utah R.App. P. 3(a) ("Failure of an appellant to take any step . . . is ground . . . for such action as the appellate court deems appropriate, which may include dismissal of the appeal . . . ."); *State v. Housekeeper*, 2002 UT 118, ¶ 23, 62 P.3d 444 ("Failure to timely file an appeal pursuant to rule 4 constitutes a waiver of the right to appeal. Additionally, failure to timely file deprives an appellate court of jurisdiction over the appeal."). In addition, the United States Supreme Court has held that dismissing the appeal of an appellant who wilfully defies court orders does not violate due process, but rather, may be a "reasonable means of safeguarding the collectibility of [a] judgment." *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 41, 43-44, 75 S.Ct. 92, 99 L.Ed. 46 (1954) ("While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process.").

As previously explained, in exercising our authority to dismiss the appeals of contumacious appellants, we have discretion to fashion a remedy that is fair and just under the

facts and circumstances of the particular case. Accordingly, we hereby stay this appeal to allow Capital Suisse time to comply with the following conditions, which must be fulfilled before we will entertain the appeal on the merits. First, Capital Suisse must, within thirty days from the date of this decision, bring itself into compliance with the orders of the district court in this matter, including those orders requiring Capital Suisse to comply with discovery and to return all of the requested documents and evidence to Utah. Second, inasmuch as we are concerned that any continued delay will lead to the further dissipation of Capital Suisse's assets, we also require Capital Suisse to post bond with the district court in the amount of any unsatisfied portion of the judgment that has been entered against it.

We therefore remand this matter to the district court to make the following determinations: (1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; (2) the amount of the unsatisfied portion of the district court judgment; and (3) whether Capital Suisse has posted an adequate bond in that amount.

In light of the various determinations that must be made by the district court on remand, we will allow Capital Suisse ninety days from the date of this decision in which to comply with the conditions specified above. Accordingly, Capital Suisse must, within ninety days, provide this court with notice that it has complied with these conditions, including the relevant orders of the district court regarding whether Capital Suisse has fulfilled the court's discovery orders within the allotted thirty-day time period and posted bond in the appropriate amount. If, at the end of ninety days, Capital Suisse has failed to comply with each of these requirements, or continues to resort to evasive or dilatory tactics, the appeal will be dismissed without further notice or argument.

CONCLUSION

Due to appellants' wilful disobedience and defiance of district court orders, we refuse to reach the merits of this appeal. Instead, we stay the appeal and remand to the district court to make the determinations described herein. Appellants' failure to comply with any of the conditions outlined in this opinion will result in dismissal of the appeal.

Chief Justice DURHAM, Associate Chief Justice WILKINS, Judge ORME, and Judge BEACHAM concur in Justice DURRANT's opinion.

Having disqualified themselves, Justice PARRISH and Justice NEHRING do not participate herein; Court of Appeals Judge GREGORY K. ORME and District Judge RAND G. BEACHAM sat.

APPENDIX B

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

[Filed October 20, 2004]

Consolidated Case No. 010905355
Judge Anthony Quinn

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against:

PHILIP DAVID GUBBAY

Court of First Instance and Instruction
No. 2 Marbella
Court No. 1346/2000

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,
Defendants.

ORDER DENYING DEFENDANTS' EXPEDITED MOTION SEEKING DECLARATION REGARDING OUTSTANDING ORDERS AND SATISFACTION OF BOND AND DETERMINATION OF DEFNDANTS' COMPLIANCE WITH UTAH SUPREME COURT REQUIREMENTS

The Capital Suisse Defendants'[1] Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond came before the Court without hearing.

The Court having reviewed the memoranda and arguments filed by the parties and the Supreme Court Opinion of *Hentsch Henchoz & Cie v. Gubbay*, 2004 UT 64, 505 Utah Adv. Rep. 29,—P.3d—, 2004 WL 1753372, and for good cause appearing,

IT IS HEREBY ORDERED AS FOLLOWS:

1. The Capital Suisse Defendants' Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond is Denied.

2. Pursuant to the Utah Supreme Court's instructions on remand contained in paragraph 25 of the Supreme Court's Opinion filed August 6, 2004, the Court finds and makes the following determinations:

A. The Capital Suisse Defendants have not adequately complied within thirty days of the Supreme Court's opinion with the prior orders of this Court since they failed to respond to Plaintiff's discovery requests as ordered on November 15, 2001 and February 8, 2002 and since they

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[1] The Capital Suisse Defendants refer to Phillipe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited.

failed to return all of the evidence from Spain as ordered on March 25, 2002.

B. The amount of the unsatisfied portion of this Court's judgment, jointly and severally, against the Capital Suisse Defendants is $27,868,098.63 plus post judgment interest.

C. The Capital Suisse Defendants have not posted any bond with the Court for the unsatisfied portion of the judgment.

DATED this 20 day of October 2004.

BY THE COURT:
[SEAL]
/s/ Anthony Quinn
ANTHONY QUINN
Third Judicial District Court Judge

APPENDIX C

SUPREME COURT OF UTAH

No. 20020683

HENTSCH HENCHOZ & CIE,
Plaintiff and Appellee,

v.

PHILIPPE D. DAVID GUBBAY; CAPITAL SUISSE, S.A.; CAPITAL SUISSE SECURITIES, INC.; CAPITAL SUISSE, INC.; ZOOLEY SERVICES LIMITED; ZOOLEY OF UTAH, INC.; FERNLAND LIMITED; DOUGLAS P. HOYT; and JOHN DOES 1-10,
Defendants and Appellants.

Jan. 11, 2005

PER CURIAM:

This matter is before the court on its own order to show cause. Appellants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Fernland Limited have failed to comply with this court's decision in the above-captioned matter. *See Hentsch Henchoz & Cie v. Gubbay*, 2004 UT 64, 97 P.3d 1283. Accordingly, it is hereby ordered that their appeal be dismissed.

Having disqualified themselves, Justice PARRISH and Justice NEHRING do not participate herein; Court of Appeals Judge GREGORY K. ORME and Fifth District Judge G. RAND BEACHAM sat.

APPENDIX D

IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY,
STATE OF UTAH

[Filed Jul. 17, 2002]

Consolidated Case No. 010905355
Judge Ronald E. Nehring

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain against:

Philip David Gubbay

Court of First Instance and Instruction,
No. 2 Marbella
Court No. 1346/2000

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,
Defendants.

AFFIDAVIT OF DAVID UTRILLA

David Utrilla being duly sworn deposes and says that:

1. I am President of the U.S. Translation Company. The company is located at 1893 Skyline Drive, South Ogden, Utah 84403. The business of our company, among other things, is to translate documents from foreign languages into

English, and visa versa. We have substantial experience in translating legal documents, as well as providing interpreters for court proceedings. In particular, we regularly translate legal documents from French into English, and we do this service for law firms as well as government agencies. We probably perform this type of service, translating French legal documents, at least on a weekly basis.

2. Our company is a corporate member of the American Translators Association (ATA) and is also recognized by the European Translators Association as being a full service translation company.

3. Our company is one of twelve companies in the United States authorized by the French Government to perform official translations, and our company is the only authorized company in the western region of the United States.

4. Our company was asked to translate one paragraph from a contract originally written in French. To accomplish this translation, we employed two translators. One translator, Claire Bugnet, is located here in the United States and is a native French speaker, and the other, Pascal Deleu, is located in Paris, France, and is also a native French speaker. Our company regularly relies on the abilities of these two translators, and I am familiar with their abilities, and verify that their translations have always been determined to be accurate and correct.

5. We were asked to translate paragraph 12 from the document attached hereto as Exhibit A. I did not inform Mrs. Bugnet nor Mr. Daleu in advance as to who had asked us to perform the translation.

6. As translated from French into English, paragraph 12 would accurately read as follows:

> We agree that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and we renounce to take any possible

legal proceedings against the Funds under other jurisdictions. However, we agree that the Funds may choose to start legal proceedings against us under any jurisdiction directly connected with the place of sending of the mail or any other aspect of our file.

7. We certify our translation to be correct and accurate.

Dated this 22 day of August, 2001.

/s/ David Utrilla
David Utrilla

Subscribed and sworn to before me this 22nd day of August, 2001.

/s/ Cortney C. Judkins
Cortney C. Judkins

APPENDIX E

SALT LAKE CITY, UTAH

MONDAY, MARCH 25, 2002; 10:10 A.M.

HONORABLE RONALD E. NEHRING, JUDGE
PRESIDING PROCEEDINGS

[1] THE COURT: This matter is set for hearing, HHC vs. Gubbay, number 010905355. Counsel, please state your appearances for the record.

MR. LOVE: Perrin Love, your Honor, and Walt Romney for plaintiff Hentsch Henchoz & Cie.

MR. MOXLEY: Paul Moxley and Matt Evans on behalf of Gubbay and all the defendants except for Hoyt and the securities firm.

MR. MOONEY: Jerome Mooney on behalf of Douglas Hoyt, your Honor.

MR. STEPHENS: Brent Stephens for the securities firm, Capital Suisse Securities.

THE COURT: Thank you, gentlemen.

We've got several motions brought by the plaintiff relating to the time for discovery, and we also have a motion to vacate the protective order. I looked at all the papers that I received as of Thursday noon when I left for St. George and I don't think any have shown up after that.

And if everybody agrees that that's what's on the plate, Mr. Love, you may proceed.

MR. LOVE: Thank you, your Honor. Just by way of background, we have filed a motion relating to the anti-suit [2] injunction in the BVI and a related motion here. We've agreed to put that off. We wanted to hear it before the Court began its criminal calendar because there is a scheduled hearing, as if I understand it, to go forward on April 11th in

the BVI. And we wanted to hear that motion here before that hearing took place, but we've been unable to find a date that worked for everybody.

So to my understanding—Mr. Moxley will confirm that—we've agreed that the hearing in the BVI on April 11th will not go forward, or that motion will not be argued, before this Court has a chance to consider that motion. I mean that's my understanding, and it's agreed to that. And so the motions before the Court today are our motion to shorten time for discovery, and then our motion to lift the protective order.

The motion to shorten time for discovery at this point, your Honor, is basically moot. The defendants were required to produce documents on April 9th. That's the 60 days the Court gave them. Even if the Court shortened it at this point, it wouldn't make that much difference. The thing that's important to us now, your Honor, it's our understanding, based on a conversation between Mr. Moxley and Mr. Kaplan, that the documents that were here initially have been moved to Spain, and that it's the defendants' intention to make us go to Spain to inspect those documents.

We want an order of the Court requiring defendants to [3] bring those documents back here so that they are either produced here or that we can inspect them here, and that we not be required to go to Spain to do it. We also request that the defendants be required to bring all of their documents here. If they're just going to copy the documents and make us go over there and inspect them, we think they all ought to be shipped here and let us inspect them here, or just make copies of them and provide them to us.

THE COURT: Now, are the documents which are sought documents which, for the lack of a better term, in the ordinary course of business would be situated in Utah, or was it fortuitous that they were in Utah?

MR. LOVE: It's two things, your Honor. The entity here was Capital Suisse Utah and Fernland Utah. It's my understanding that those two entities, they had an office in One Utah Center, and then it moved over to the new building across from the temple, but they maintain documents in the ordinary course of business, and that those documents, after we filed our discovery request in August with our complaint, were removed to Spain. It's my understanding, that Mr. Moxley told Mr. Kaplan that that was done as a precaution in case any governmental authorities issued a search warrant of the premises, and they were removed to Spain for that purpose.

In their pleading papers, the defendants state that the reason they were moved was there has been a consolidation [4] of operations, and they consolidated operations in Spain. Those documents that belonged and were the property of Capital Suisse Utah, the Utah subsidiary, were maintained in the ordinary course of business in Utah. They should be required to be produced in Utah. I assume there is another set of documents in Spain that belong to the parent company.

THE COURT: Well, if there's an argument that the operations of the Gubbay enterprises have been consolidated in Spain, and if, for example, the documents have been consolidated and there is a fear that the redispersion of those documents would create some kind of diaspora that would last as long as that encountered by the Jews, for example, there are other ways to solve that problem, and that would include, for example, having the Gubbay folks pay for you to go to Spain and look at the documents.

MR. LOVE: That's a possibility, your Honor, but I want to bring one fact to the Court's attention that we've learned over the weekend. Our Spanish lawyer is in the same building in Marbella, Spain, that Capital Suisse, the parent company, is located. It's our understanding, based on his observations in the building, that Capital Suisse has pulled up stakes, that

their name has been taken off the door as of late last week, that a moving—a truck has come up and taken I don't know what, but taken the documents, taken the furniture and whatever, and they have vacated the premises.

[5] It's also our understanding—this is hearsay—that one of the employees of our Spanish lawyer was in the elevator with an employee of Capital Suisse, and that when they, were going down the elevator that Capital Suisse employee had a box of documents, and he told the employee of our Spanish lawyer that he was taking them out to the trash. Now, I can't verify that. I don't have an affidavit for the Court this morning.

THE COURT: Well, this is the first time an elevator conversation has made it into an argument in my courtroom.

MR. LOVE: That's exactly right. But we have a very real apprehension, your Honor, that if those documents remain in Spain, to the extent that they still exist at all, that they are going to be destroyed in Spain, that we will never get them if they're in Spain.

THE COURT: Well, if these people are as nefarious as you say they are, what makes you think they're actually going to send the documents back here based on my order that they do so?

MR. LOVE: Your Honor, I have no expectation one way or another that they will, but what I would like is, if they don't, that we have an order of this Court that's violated. We don't know what to expect from these defendants. I don't have any expectation necessarily that they will comply with any order.

THE COURT: Do you have idea what documents you [6] would—do you have any idea what the general nature and quantity of the documents were that were originally located here?

MR. LOVE: No, I do not. I do know that in the prospectus that was delivered to our client, that Capital Suisse Utah was the administrator of the fund, but there should be documents relating to the administration of the fund. There should be documents relating to investments by the fund, I would assume. That's what we expect to be there.

There would also be documents, we think, your Honor, relating to PetsMarketing, which had a business address in the same office in-the same location as Capital Suisse Utah. We suspect that those documents, such that they exist, have been spirited to Spain as well, and we want those documents brought back as well. But I have to say I am speculating based on the information in the prospectus and the information of just business addresses, who's located where, who's the registered agent, that kind of thing. That is what we would expect to find there.

THE COURT: Uh-huh (affirmative).

MR. LOVE: So that is the first motion we have. Our second motion, your Honor, is that we would like the protective order lifted so that we can—in the words of Deep Throat—we can follow the money, because we have to be able to follow the money in order to try to get our money back, and part of that [7] is based on the reasonable apprehension, as the Court just indicated, that we're never going to get any documents from the defendants, that we'll never be able to trace our money through the documents that they may or may not provide, may have kept, may have destroyed.

What we need to be able to do, your Honor, in order to trace our money and try to get it back, is take the documents from the Zions and the Wells Fargo accounts, take them to other jurisdictions where the money was deposited, like Vanuatu, present those documents, any information in those documents, to the banking authorities in Vanuatu, to the regulatory authorities, so we can get access to whatever

banking records exist in Vanuatu, because we have a reasonable apprehension that we are never going to get those documents from the defendants.

And we need to be able to take the Zions and the Wells Fargo documents, trace it to Vanuatu, and then wherever it goes from there. And we need the protective order lifted so that we can follow our money and that we are no longer limited to presenting the evidence in those documents to the courts or the regulatory authorities in either the BVI or Spain.

We need to be able to follow our money. We need to be able to get it back, particularly in light, as I say, of hearsay, but particularly in light of our belief and reasonable apprehension that they have pulled up stakes, that they are [8] getting rid of the documents, and that the only way we're ever going to have a chance to get any of our money back is to present this information to the regulatory authorities and to the banking authorities in other jurisdictions. And we need to be able to use the documents in that way, and the only way we can do that is to have the protective order lifted in its entirety.

THE COURT: The problem that I have—this surfaces with unfortunate regularity—is that the suggestion that the defendants' affairs are being consolidated in a dumpster in Spain is very provocative, a very provocative allegation, and it happens from time to time that—in fact there may be actually kind of a rule, à la Newtonian physics, that the more provocative the allegation, the thinner the factual basis for it. So it would certainly be useful for me to have more solid support—

MR. LOVE: Sure.

THE COURT: —for the consolidation-in-the-Dumpster theory, but . . .

MR. LOVE: Let me put it this way, that the factual basis for that is the observation of our lawyer in Spain.

THE COURT: Yeah, I know, but I don't have anything in front—

MR. LOVE: I know.

THE COURT: It doesn't—

[9] MR. LOVE: Right.

THE COURT: —rise to level of record—

MR. LOVE: I understand that.

THE COURT: —credibility.

MR. LOVE: I sure understand that. But my point, that is an apprehension on our part—

THE COURT: Yeah.

MR. LOVE: —and the Court does not need to rely on that fact in order to lift the protective order. We need to have the protective order lifted so that we can trace our money and try to get it back.

THE COURT: And I suppose that, just as it would be possible for the Gubbay people to pay for you to visit Spain, you would be willing to pay them to ship the documents back, or copies of the documents.

MR. LOVE: From Spain to here?

THE COURT: Yes.

MR. LOVE: Oh, absolutely.

THE COURT: Yeah.

MR. LOVE: No question about it.

THE COURT: Okay. Thank you.

MR. LOVE: Thank you.

THE COURT: Mr. Moxley. So why shouldn't Love write a check, and you guys copy the documents—it's at his expense—and just send them back?

[10] MR. MOXLEY: Well, can I give you a long answer to that?

THE COURT: Absolutely.

MR. MOXLEY: Okay.

THE COURT: I'll settle back in my chair.

MR. MOXLEY: Thank you. That's probably the worst part about being a judge, is having to listen to all this drivel.

THE COURT: It depends on who's giving the long answer.

MR. MOXLEY: Thank you. Let me try to put this in a context. First of all, when we were last here, on one in many so-called emergency hearings, right before the Olympics started on February the 8th, for about the tenth time they were trying to get you to change the protective order.

THE COURT: But bear in mind—

MR. MOXLEY: I'm going to get to that.

THE COURT: Your long answer has stimulated me to interrupt you, because so-called emergencies take on the appearance of real emergencies when I learn that the day before this hearing your guys filed an anti-injunction proceeding, anti-suit injunction proceeding, in the BVI.

MR. MOXLEY: Well—

THE COURT: It suddenly becomes an emergency.

MR. MOXLEY: Okay. Actually, it was—I think it was [11] that same day.

THE COURT: Okay.

MR. MOXLEY: And quite frankly, I never heard of any anti-suit injunction before, but we're not here to argue—

THE COURT: Me neither, but it scared the hell out of me.

MR. MOXLEY: Well, what happened was, the lawyers in the BVI said that they thought they'd get an injunction, and it's à way to think about that. And we said, "Well, if you can get it, get it."

THE COURT: Okay. But I've knocked you off track.

MR. MOXLEY: Okay. But as far as a fair playing field, as far as injunctions are concerned, nobody in practice does any more than you have to, and we're no different. Okay.

We were here on February the 8th on one of these so-called emergency hearings. And what concerned the Court the most, at least it seemed to us, is that you wanted the judge in the BVI, and maybe Spain, to know about the information in the fact documents. And at least in your own mind, that's how you were justifying your decision, whereas, you know—not justifying. Maybe that's a bad choice of words.

But, you know, you were reviewing the judge's decisions from the BVI, and you were thinking, "Gee, they don't know what I know. There's all this information on the bank documents, money to the father, the wife," blah-blah-blah.

[12] THE COURT: Including, a moment, blah-blah-blah, asserting the Fifth Amendment.

MR. MOXLEY: Absolutely. Okay. So, you know, we finished up that hearing. They had (inaudible). They were supposed to prepare the order. A couple of weeks go by, two or three weeks go by. I called Mr. Kaplan, trying to draw him out, because under the papers they submitted to you, the order you gave us in reference of their documents, they don't want to create a smokescreen. They can't do it under Swiss law. They can't produce what we got you to enter an order about.

Okay. So let me bring you to the relevance. So I—

THE COURT: I don't understand that, though.

MR. MOXLEY: Okay. The weight from their papers, when they argued that you shouldn't compel them to give us their customer information—

THE COURT: Uh-huh (affirmative).

MR. MOXLEY: —what you ordered ultimately, according to their papers, that they weren't stretching it, they can't produce. So they—

THE COURT: I thought I ruled on that.

MR. MOXLEY: You did. You gave us an order they've got to produce it.

THE COURT: And you're saying the papers—

MR. MOXLEY: But they can extract the names—

THE COURT: Correct.

[13] MR. MOXLEY: —of investors. But what they told you, under Swiss law they can't even do that. So I'm calling Kaplan, trying to fish out from him two things. I'm saying—and let's back up one more moment. The primary witness that the plaintiff has in this case no longer works for the bank. He got canned because he made this investment. And under Swiss law, we can't take his deposition. If he agrees to talk to us and cooperate and will leave Switzerland—he won't return our phone calls.

THE COURT: But didn't I address that question also?

MR. MOXLEY: Not really, because it doesn't apply to this guy, because we can't get him unless he'll cooperate with us. So as far as us getting what we need from them, we can't get it, and they know it. Okay?

Now, that causes them other problems with their case. But so I said, "Mr. Kaplan, tell me, are we going to have to go to Switzerland to look at your documents, the customer files?" And he says, "No." And I said, "Well, with respect to the"—and this is almost like elevator conversation.

THE COURT: Which beats elevator music.

MR. MOXLEY: Maybe it's worse. Maybe it's worse. But in any event, I say to Mr. Kaplan—and I told the Court that none of the documents were here, and we'll get to that in a minute. And I said, "Well, you're going to have to go to Spain." And I'm telling him this like, you know, two or three [14] weeks ago so we can make the arrangements and go over there, and he can look at the documents, and if I have to go to Switzerland to look at his documents or we've got to do depositions. It's the spirit of cooperation.

THE COURT: Yeah, because this is very tough duty.

MR. MOXLEY: Yeah. I've had worse. Spending a couple of days in Tooele, that's bad.

THE COURT: There you go.

MR. MOXLEY: More of our documents a little different than this. I'll grant you that. Although I love Tooele.

Anyway, so I'm trying to be proactive and try to address some of these. So then they show up with these papers, taking, I think, my remarks out of context.

Now, let's get to the specifics on the documents. You'll remember, you entered an order last summer freezing our bank accounts. They've been out of business in Utah ever since then. They've left—they've got a temporary up there answering the phone, and those offices are going to be closed within days. There's been no business.

THE COURT: Uh-huh (affirmative).

MR. MOXLEY: And in connection with the—in December, we were looking at what they had, and quite frankly what they had had at that point was only what happened—well, the bank checks that you already gave them. It was the information on the wire transfers from Gibraltar, so it only [15] tells part of the story. And it had due-diligence stuff and

other materials, and the client was consolidating its business, closing down its office.

We gave the instructions or some suggestions, "Well, put them where you would ordinarily put them and don't destroy them," and that's that. And under the rules, it's where the records are kept in the ordinary course, and so they have to go to Spain.

THE COURT: Unless I tell them otherwise.

MR. MOXLEY: Yeah. That's right.

THE COURT: Let's look at this as a practical matter. We're talking about documents which were originally located approximately half a mile from here.

MR. MOXLEY: That's right.

THE COURT: Okay. They are now 12,000 miles from here. They are susceptible to return to half—

MR. MOXLEY: Sure.

THE COURT: —a mile from here.

MR. MOXLEY: Sure.

THE COURT: And technically, you may be right, but you'd be on much solid—more solid ground if those documents were never housed a half a mile from here.

MR. MOXLEY: Yeah, that's true. But the test is the same; it's the ordinary course. But I mean it's hard to get into a legal argument with you about it. I believe that.

[16] THE COURT: Yeah. I'd like to have you guys go to Spain, but it just doesn't—

MR. MOXLEY: Well, the weather's getting pretty good over there.

THE COURT: Yes, it is. But it just strikes me as being silly, would be the legal term.

MR. MOXLEY: Well, first of all, at some point there's a lot over there that has to be looked at anyway by us if we're going to produce everything responsive to this deposition, because everything on the Spanish side, we've never seen it; we don't know what exists. And if they want it, we've got to go over there anyway, and they're not making life easy on us in this case.

THE COURT: Well, let me tell you, I'm—I will tell you I'm sympathetic to finding a way to permit you to take the deposition of the former plaintiff employee. I mean it strikes me that, given my sense of how discovery should work in the country that I would operate as philosopher king, they ought to be able to talk to—you ought to be able to talk to this person.

So my predisposition is to just cut through the undergrowth and kind of create a highway to discovery in this case. I mean that's my overall predilection in this case, to just cut through the crap and get the discovery done as quickly as possible, honoring, as I must, the substantive laws of [17] nation states, but circumventing, where I can, procedural obstacles which are inconsistent with my view, and here my means, the courts of the state of Utah and the United States of America, obstacles to discovery, that's where I'm going on this.

MR. MOXLEY: Well, so in any event, I think it's going to be interesting to see whether they produce their documents in this case, and a lot of this may be a smokescreen, but it's hard, for a lawyer to predict any future event.

With respect to the anti-injunction suit, what we did agree is that we would tell the lawyer in the BVI not to have it heard. Their procedure's a little bit different, and I've explained this to counsel, but if something goes wrong, so you understand it as well. Last time, when we told them that we wanted it continued, he had to appear in court and ask for what they call an adjournment and appear in person to get an extension.

THE COURT: I think they should do that here. I like this idea.

MR. MOXLEY: Yeah, it probably interrupts a good afternoon on the beach. But in any event, that's how it works out there, and that's what we've asked them to do. And the judge in the BVI could rule without a hearing too. I mean just so there's no misunderstanding on what the story is.

THE COURT: Okay. I understand.

[18] MR. MOXLEY: Thank you.

THE COURT: Mr. Stephens, do you want to weigh in on this? Do you have a dog in this fight, so to speak?

MR. STEPHENS: No. I'm going to weigh out. It doesn't involve Capital Suisse Securities. The documents at Capital Suisse Securities, I'm attempting to get clearance dates so that they can look at them. Just to have a gander towards the tribunal, they're asking the change of management, I have been informed, of Capital Suisse Securities, from Slipka, who I was reporting to, to a new board of directors, and apparently a new broker principal, but as far as—the documents that we're talking about today have nothing to do with Capital Suisse Securities.

The Capital Suisse Securities documents were, per agreement, going to be produced at San Francisco. We were getting clearance dates for those documents, and then we had a change in management, and that caused the plaintiff to file its motion to compel because they didn't receive the dilatory (inaudible) clearance dates (inaudible) to go to San Francisco.

I have written them a status report as to where the case is presently. I learned about the change of management approximately a week ago, a week and a half ago, informed counsel for plaintiff as to that fact, wrote the new management a status report, told them that I needed to get a clearance date for the review of documents. I filed a document response [19]

indicating what documents [unintelligible] and everything was perfectly copacetic and running smoothly until we had this change of management.

So hopefully we will get a clearance date soon as to when the plaintiffs can look at or when we will get those documents at Capital Suisse Securities. There cannot be a problem, I can't perceive, of producing the original documents. In any event, we produced a lot of documents voluntarily already. The tracing issue, we produced documents as to that, so we're on a different plane than the so-called Capital Suisse group defendants.

I don't understand what they're complaining. I've explained to my client over and over again that we needed to comply scrupulously and follow orders of the court and all promises made pursuant to discovery, and I plan to fulfill that. So I'm not weighing in as to the problem with the dumpster in Spain.

THE COURT: Uh-huh (affirmative).

MR. STEPHENS: I have no information and no belief that that's where our documents are. I just think that the change in management has caused the problems.

THE COURT: Yeah.

MR. STEPHENS: But it is the flag—I had great confidence in the former management; I don't know the new management. So that's just to be candid with the Court. I'm [20] still trying to get the clearance date.

THE COURT: Thank you, Mr. Stephens.

Mr. Mooney?

MR. MOONEY: And Mr. Hoyt has no position with regards to that.

THE COURT: Yeah, I didn't expect that he would.

Now, Mr. Love, although it's not before me today, I'd just like to encourage a little dialogue about the former employee and that former employee's availability or unavailability to be examined. What's your current knowledge on that?

MR. LOVE: Your Honor, to be honest with you, I don't have any knowledge beyond what we talked about last February 8th. It's my understanding Mr. Joliet is no longer an employee of the bank. Defendants are free to talk to him. We said when we were here February 8th that we would agree to cooperate and try to schedule his deposition. I don't know enough about Swiss law to know whether, if Mr. Joliet says "I don't want to deposed," he can be forced to be deposed. To be honest with you, I don't know anything about that.

THE COURT: Uh-huh (affirmative).

MR. LOVE: I will say we are cooperating in discovery. Contrary to Mr. Moxley's concerns, we fully intend to produce the documents. They're in the process of being redacted. It's my understanding that they are going to be [21] produced here, and we've offered to enter a stipulation with the defendants that we will produce our documents the same day they produce theirs.

THE COURT: Uh-huh (affirmative).

MR. LOVE: And if it's April 9th, that's fine. If it's earlier or later, we're going to produce our documents. They're going to be redacted to remove the name of the customer and the account number so that the customer can't be identified, but we're going to give them the information that the Court told us to produce when we were here February 8th, and we certainly fully intend to go forward with that.

So I'm not sure what Mr. Moxley's talking about when he says he's concerned that this is sort of a smokescreen. What we want are the documents here. We want the documents to be produced here—as the ones that were originally here,

should be ordered to come back. The documents that were originally in Spain should be produced here, and we will pay for those copying charges.

And then the last point, your Honor, and actually at this point it's the more important point, is we need, the protective order lifted so we can trace our money. We said in our pleadings when we were here in February that really the protective order as the exception, not the rule. We ought to be able to take the information in those bank accounts and trace our money across the globe. That's what we need to be [22] able to do, because at this point have no confidence that we're ever going to be able to do that through the documents provided; by defendants.

THE COURT: Yeah. Thank you, Mr. Love.

From time to time it's useful—I think it's actually important for judges to step back and look at what they've done in a case and evaluate whether there's been an evolution in a judge's approach to a case and whether that evolution is a good one or a bad one, or whether the judge is kind of yielding to impulses that are not based on the facts and the law.

Here's what that means in this case. As I look back to my own approach to this case, when it first came to me I was very timid about exercising authority in the face of my ignorance of the rules and the statutes of the other relevant jurisdictions. I'm not embarrassed to tell you that, you know, when this showed up, I didn't know anything about comity. I didn't know anything about the respective rules of procedure, evidence, much less the substantive rules of the relevant jurisdictions.

As I have developed an awareness of the facts in the case, I have abandoned my timidity and replaced it with what I tried to describe to Mr. Moxley, and I think Mr. Moxley accurately addressed what was motivating my decisions in the previous

motion. I read—what's his name? Judge Benjamin? read Judge Benjamin, and you know how I feel about Judge [23] Benjamin. There's somebody who is very skilled—though I've said and I still believe should come here and teach CLE about I writing decisions—but who I believed could have benefitted from the knowledge that I had.

I'm faced now with something about which I—yet another thing about which I have no knowledge, the anti-suit injunction proceeding. I find reinforcement for the view that Judge Benjamin ought to know what's going on, to the extent that any of us know what's going on, before Judge Benjamin or whoever has jurisdiction of that event, rules on that.

So this leads to my rather crude remark about my desire to kind of wield a machete to the obstacles to discovery, wherever they may be, and that's how I'm going to proceed. I only hope that I have the good sense to step back, if confronted with a legitimate argument that there is a rule or rules in other jurisdictions which should be honored, and I should sheathe my machete for a little bit, but I haven't been persuaded of that.

Therefore, with respect to the documents which were the subject of the production request—and here's a limitation that may or may not be relevant—and which were originally housed in Salt Lake City, and maybe other relevant documents that have always been in Spain, what I'm about to say doesn't affect us, except if there's a stipulation of the parties at this point to the contrary.

[24] I'm ordering that those documents, copies of those documents, be produced in Salt Lake City with the expense of copying and shipping to be borne by the plaintiffs. So, although it's not an issue that's before me, and although Mr. Love has indicated that it's his client's intention to do it voluntarily, I'm going to order that the same rule apply to the plaintiffs with respect to documents subject to document-

production requests by the defendants. In other words, the defendants pay, the plaintiffs' copy, the plaintiffs ship.

Turning to the protective order, I totally agree with Mr. Love that the time has come to make everything available to everybody, and I'm not going to hide the ball about this that behind this decision is my belief that the invocation of the Fifth Amendment permits inferences to be drawn from the invocation of the Fifth Amendment supporting the claims made by the plaintiffs in this case, and that one of the consequences of invocation of the Fifth Amendment in a civil action is that the application for protective orders by the party who invokes the Fifth Amendment become more suspect than they otherwise would be, and the obligation of me to permit plaintiffs who have been confronted by the invocation of the Fifth Amendment, those plaintiffs should be afforded an opportunity to get to the bottom of what's going on.

Now, I suppose that the defendants can assert the [25] Fifth Amendment over these documents, too, and we've kind of been through that drill and looked at the cases on that subject during the last go-around, and that's kind of an interesting issue. But the protective is lifted.

Now, if there's some way that I can turn this into an opportunity for you all to travel to Spain and Switzerland, I'm certainly happy to do that, you know.

All right. Mr. Love, if you'd prepare an order.

MR. LOVE: I will. Just so I understand, it was the Court's intention not to issue any ruling whatsoever with regard to the defendants' documents that were originally in Spain and are now in Spain because that's not before the Court? Did the Court intended to order defendants to produce those documents here—

THE COURT: No.

MR. LOVE: Has to produce and pay for it.

THE COURT: No. The issue as I understood it was, what happens — what really offended you, as I understand it, was having the documents shipped back.

MR. LOVE: Yes

THE COURT: And Moxley has a case. Unless there's agreement, you go to where the documents are, where they're kept in the ordinary course of business. The ambiguity here, is, where were the Salt Lake documents kept in the ordinary course of business, and when in time do we look to see where [26] they were kept in the ordinary course of business?

MR. LOVE: But the Court has ordered us to produce our documents that are in Switzerland here, and we would be happy—

THE COURT: But, Mr. Love, bear in mind what the genesis of that was. All I was doing was codifying what you had offered to do voluntarily.

MR. LOVE: Sure.

THE COURT: And so I'm not buying into, the next step, that I should take your voluntary offer, which I have codified, and then turn it into an order that they do the same thing. No, I'm not ready to go that far. You know, if there's law to support it, I'm sure I'll see it, but not yet. I'm not going to do that yet.

MR. LOVE: So that's before the Court. The Court's not issuing any ruling on that issue?

THE COURT: No.

MR. LOVE: All right. Thank you, your Honor.

MR. MOXLEY: Well, why don't we ask you for a ruling about that. Otherwise, we'll be back over here in a week. I mean we intend to produce the documents that are in Spain in Spain. I mean, why dance around it?

THE COURT: Well, because they haven't briefed it. I mean you've told me—

MR. MOXLEY: Okay.

[27] THE COURT: —that the rule is that if they're maintained in the ordinary course in Spain, that that's where the site of production is. Well, I haven't heard from them don't know.

MR. MOXLEY: Okay.

THE COURT: Okay. Thank you.

MR. MOXLEY: Thank you.

THE COURT: We're in recess.

(Proceedings concluded at 10:49 a.m.)

APPENDIX F

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY STATE OF UTAH

[Filed Apr. 2, 2001]

Civil No. 010905355
Judge Ronald E. Nehring

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILLIPE D. DAVID GUBBAY, CAPITAL SUISSE, SA., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,
Defendants.

NOTICE OF WITHDRAWAL OF ANSWER

Defendants Phillipe D. David Gubbay, Capital Suisse, S.A., Captial Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Fernland Limited (collectively, the "Capital Suisse Defendants") hereby provide notice to the Court that they are hereby withdrawing their Answer to the Complaint.

The Capital Suisse Defendants and the plaintiff are currently litigating the same set of facts in this action in several different countries, including Spain, Gibraltar, the British Virgin Islands and the United States. In the investment contracts between the Capital Suisse Defendants and HH&C, the parties agreed that all disputes, regarding the contracts would be litigated in one venue, the British Virgin Islands. For this reason, the Capital Suisse Defendants do not believe that this Court has jurisdiction to allow HH&C to proceed in this Court and they lack the resources necessary to litigate

against HH&C in several different countries and jurisdictions. For these reasons, the Capital Suisse Defendants hereby withdraw their Answer as if it were Nunc Pro Tunc. The Capital Suisse Defendants refuse to acknowledge this litigation any further and have instructed their attorneys to take no further action on their behalf.

DATED this 1st day of April, 2002.

HOLME ROBERTS & OWEN LLP

/s/ Paul T. Moxley
PAUL T. MOXLEY
Matthew N. Evans
Christine T. Greenwood
Attorneys for the Capital Suisse Defendants

APPENDIX G

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

[Filed Jul. 17, 2002]

Consolidated Case No. 010905355
Judge Ronald E. Nehring

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against:

Philip David Gubbay

Court of First Instance and Instruction
No. 2 Marbella
Court No. 1346/2000

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,
Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AGAINST PHILIPPE D. DAVID GABBAY AND THE CAPITAL SUISSE DEFENDANTS

On June __, 2002, the Court heard argument on Plaintiff's Motion for Summary Judgment on the First, Second and

Sixth Claims against the Capital Suisse Defendants.[1] Plaintiff Hentsch Henchoz & Cie ("HH&C") was represented by Neil A. Kaplan, Perrin R. Love and Walter A. Romney, Jr. The Capital Suisse Defendants were properly served and notified of Plaintiffs Motion and chose not to oppose, or be present during the argument on, the Motion.

Based on the evidence presented by HH&C in its Motion, including the undisputed material facts and related exhibits which are deemed admitted and proven, this Court concludes that HH&C has proven by clear and convincing evidence that the Capital Suisse Defendants committed fraud and participated in a civil conspiracy to commit fraud, against HH&C and further concludes that HH&C has proven by a preponderance of evidence that the Capital Suisse Defendants breached their fiduciary duty to HH&C. The Court finds that the Capital Suisse Defendants defrauded HH&C of $24,730,000 by acting in concert to create the appearance of a legitimate investment opportunity in Capital Suisse S.A. (the "Fund"), when, in fact, the Fund was nothing more than a ruse to defraud innocent investors. To induce HH&C to entrust its money to them, the Capital Suisse Defendants fabricated net asset value ("NAV") numbers for the Fund that had no basis in reality. The Capital Suisse Defendants further created the false appearance of legitimacy by misrepresenting that Baker & McKenzie (London) was the legal advisor to the Fund and that Deloitte, Touche & Tomatsu (BVI) was the auditor to the Fund, neither of which was true. Once the Capital Suisse Defendants, through these and other misrepresentations, obtained HH&C's money, they did not invest the money in legitimate investment opportunities as represented, but rather disseminated the money worldwide for the benefit of Phillip D. David Gubbay ("Gubbay"), his relatives, friends, and asso-

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[1] The "Capital Suisse Defendants" refers to Phillipe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited.

ciates, as demonstrated by the exhibits to HH&C's memorandum in support of its motion for summary judgment.

The Court further finds, and the evidence establishes, that the Capital Suisse Defendants intended from the outset to commit fraud on a massive scale and never intended to invest HH&C's money. The purported "Subscription Agreements" between HH&C and the Capital Suisse Defendants, and any related documents, therefore, are void *ab initio*, for fraud. Consequently, the Capital Suisse Defendants have no rights under or arising from those purported Subscription Agreements, and were not, and are not, entitled to redeem HH&C's money "in specie," *i.e.*, with purported assets of the Fund. The evidence further demonstrates that the Capital Suisse Defendants' attempt to force HH&C to accept shares of PetsMarketing, Inc. in lieu of cash was merely another part of the Capital Suisse Defendants' fraudulent scheme and conspiracy. The Capital Suisse Defendants misrepresented to HH&C, and to this Court, the value of the PetsMarketing shares purportedly transferred to HH&C at over $30 million. In fact, those shares had virtually no market or market value. Moreover, the Capital Suisse Defendants themselves manipulated the trading in PetsMarketing, Inc. to boost artificially the publically-quoted price of PetsMarketing, Inc. shares.

This Court's finding that the Capital Suisse Defendants defrauded HH&C is strongly supported by the Capital Suisse Defendants' conduct in this litigation. The Capital Suisse Defendants invoked the Fifth Amendment privilege against self-incrimination to avoid complying with their most basic discovery obligations in this matter. Although this Court ruled that the Capital Suisse Defendants improperly had invoked the Fifth Amendment privilege and ordered them to comply with HH&C's discovery requests, the Capital Suisse Defendants refused to do so. To the contrary, while this litigation was pending, the Capital Suisse Defendants removed documents that they previously had maintained in their Utah

offices to Spain. When ordered by this Court to return the documents and make them available for discovery, the Capital Suisse Defendants refused to comply with the Court's order and abandoned their defense of this litigation. This is not the conduct of legitimate business persons. Indeed, the conspiracy against HH&C is still ongoing, as the Capital Suisse Defendants continue to this day to coordinate with one another to hide and launder HH&C's money, to destroy and conceal evidence of their wrongdoing, and to eliminate the paper trail that would lead HH&C to its money.

In light of the compelling evidence that the Capital Suisse Defendants were, and are, engaged in fraud, and coupled with their improper invocation of the Fifth Amendment and their removal of documents from this jurisdiction, effectively destroying evidence, the Court concludes that the Capital Suisse Defendants knew that the evidence, documents and other information they were ordered, but refused, to provide, would further prove their fraud and assist HH&C to find and recover its assets.

The Capital Suisse Defendants' recent refusal to acknowledge this litigation is simply another ploy to avoid the consequences of their worldwide fraudulent conduct. Until they were ordered to comply with discovery, the Capital Suisse Defendants fully participated in the defense and litigation of this case by, among other things, filing an Answer to the Verified Complaint, serving discovery requests upon HH&C, filing several motions to dismiss on various substantive and procedural grounds, and twice seeking leave of the Utah Supreme Court to file interlocutory appeals. Based on the record and evidence in this matter, it is abundantly clear that this Court properly exercised jurisdiction over the Capital Suisse Defendants.

The Court having carefully reviewed the memoranda filed by HH&C, including the exhibits thereto, and having con-

sidered the arguments of counsel, and for good cause appearing.

IT IS HEREBY ORDERED, ADJUDGED and DECREED AS FOLLOWS:

1. HH&C's Motion for Summary Judgment on the First, Second and Sixth Claims against the Capital Suisse Defendants is GRANTED.

2. Upon entry of the Judgment, monies held pursuant to this Court's temporary restraining order at Zions First National Bank and Wells Fargo Bank, shall be immediately released to Plaintiff and the bonds that HH&C posted as security for the temporary restraining order shall also be released to HH&C.

3. The Capital Suisse Defendants, and all others acting in concert with them, are permanently enjoined from transferring and/or dissipating HH&C's assets and monies and from hiding, destroying or otherwise disposing of any records, documents or property belonging or in any way relating to HH&C's monies, to the flow of assets, proceeds, property or investments relating to those monies.

4. The Capital Suisse Defendants assets worldwide, wherever they may be located, are frozen and ordered attached, garnished and subject to the imposition of a constructive trust, to satisfy the money damages judgment awarded herein.

5. The Court determines, pursuant to Utah R. Civ. P. 54(b), that there is no just reason for delay of entry of judgment. The Court directs, pursuant to Utah R. Civ. P. 54(b), that final Judgment be entered in favor of Plaintiff HH&C against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited on the First Claim for fraud, the Second Claim for breach of fiduciary duty and the Sixth Claim for civil conspiracy. The Court notes that the litigation

in this case is complete against the Capital Suisse Defendants and that the courts adjudicating other actions involving some or all of the Capital Suisse Defendants in Spain, Gibraltar and the British Virgin Islands may want to be advised of this Court's final judgment.

DATED this 16th day of July 2002.

APPENDIX H

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355
Judge Ronald E. Nehring

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against:

Philip David Gubbay

Court of First Instance and Instruction
No. 2 Marbella
Court No. 1346/2000

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY of UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, AND JOHN DOES 1-10,
Defendants.

This action came on for hearing, before the Court, on Plaintiff Hentsch Henchoz & Cie's ("HH&C") motion for summary judgment on the first, second and sixth claims in the Verified Complaint against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited.

The issues having been heard and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED as follows:

1. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc, and Fernland Limited, for their fraud in the principal amount of $24,730,000 plus prejudgment interest in the amount of $3,138,098.63 for a judgment on HH&C's fraud claim in the amount of $27,868,098.63.

2. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited for their breach of fiduciary duty in the principal amount of $24,730,000 plus prejudgment interest in the amount of $3,138,098.63, for a judgment on HH&C's breach of fiduciary duty claim in the amount of $27,868,098.63.

3. Judgment is entered in favor of HH&C and jointly and severally against Defendants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited for their civil conspiracy in the principal amount of $24,730,000 plus prejudgment interest in the amount of $3,138,098.63 for a judgment on HH&C's civil conspiracy claim in the amount of $27,868,098.63.

4. The Capital Suisse Defendants, and all others acting in concert with them, are permanently enjoined from transferring and/or dissipating HH&C's assets and monies and from hiding, destroying or otherwise disposing of any records, documents or property belonging or in any way relating to HH&C's monies, to the flow of assets, proceeds, property or investments relating to those monies.

5. The Capital Suisse Defendants assets worldwide, wherever they may be located, are frozen and ordered attached, garnished and subject to the imposition of a constructive trust, to satisfy the money damages judgment awarded herein.

DATED this 16 day of July 2002.

BY THE COURT

/s/ Judge Ronald E. Nehring
JUDGE RONALD E. NEHRING
Third District Court

APPENDIX I

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

[Filed Sep 3, 2004]

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY of UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, AND JOHN DOES 1-10,
Defendants.

AFFIDAVIT OF PHILIP D. GUBBAY

Philippe D. Gubbay, being duly sworn, states as follows:

1. I am over twenty-one years old and am competent in all respects to make this Affidavit. I have personal knowledge of the facts stated herein.

2. I am a citizen of France and currently a resident of Spain.

3. I am a director of Fernland Limited ("Fernland"), which is a director of Capital Suisse, S.A. ("the Fund"), a foreign corporation.

4. I am also an officer and director of Zooley Services, Limited ("Zooley"), a foreign corporation.

5. On approximately July 25, 2000, the Spanish Marbella Court entered a Precautionary Measure, ordering that all of my personal assets and the assets of all companies under my direction and control in Spain be frozen. This Precautionary Measure became effective indefinitely on approximately January 24, 2001. The July 25, 2000 Precautionary Measure remains in effect at the present time.

6. On approximately May 15, 2001, the Spanish Marbella Court extended the July 25, 2000 Precautionary Measure to include the assets held by myself and the Fund in Gibraltar, Amsterdam, and New York City. A true and correct copy of the May 15, 2001 Extension is attached hereto as Exhibit 1.

7. The Spanish Marbella Court further extended the July 25, 2000 Precautionary Measure on approximately May 17, 2001 to include the Wells Fargo Bank and Zions First National Bank accounts in Salt Lake City, Utah of myself, the Fund and Zooley. A true and correct copy of the May 17, 2001 Extension is attached hereto as Exhibit 2.

8. On March 6, 2002, the Spanish Court entered an Order continuing in effect its Precautionary Measures freezing assets. A true and correct copy of the March 6, 2002 Order is attached hereto as Exhibit 3.

9. On March 12, 2002, the Spanish Marbella Court entered an additional order reaffirming its March 6, 2002 Order. A true and correct copy of the March 12, 2002 Order is attached hereto as Exhibit 4.

10. The Spanish Marbella Court's March 12, 2002 Order remains in effect at the present time.

11. The Fund, Fernland, Zooley and I have no assets in locations not expressly included the Spanish Marbella Court's Precautionary Measures and Orders.

12. Capital Suisse, Inc., Capital Suisse Securities, Inc. and Zooley of Utah, Inc. are no longer active, solvent entities.

13. In its August 6, 2004 Opinion, the Utah Supreme Court ordered "Capital Suisse"[1] to post an adequate bond with the district court within 30 days of the date of the Order.

14. Because the Precautionary Measures and Orders entered by the Spanish Marbella Court prohibit the disposal (in any form) of any of the assets of myself or any company under my direction or control, including the Fund, Fernland and Zooley, any attempt these companies or me to post the bond required by the Utah Supreme Court would violate the Precautionary Measures and Orders of the Spanish Marbella Court and would potentially subject me and the companies to criminal charges for contempt of court.

15. Even if the Precautionary Measures and Orders entered by the Spanish Marbella Court were not in effect, neither the Fund, Zooley, Fernland nor me have sufficient funds to post the bond required by the Utah Supreme Court. In fact, I am bankrupt.

16. I have attempted to secure an adequate bond for myself and the companies but all such attempts have failed.

17. I understand that the judgment entered by the district court on July 18, 2002, is in effect until reversed by the Utah Supreme Court, and that Plaintiff can execute on this judgment.

18. Capital Suisse has not sought a stay of execution of judgment in this matter due to its financial inability to post a bond.

DATED this 30th day of August, 2004.

/s/ Philippe D. Gubbay

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[1] The Utah Supreme Court defined "Capital Suisse" in its opinion as myself and The Capital Suisse Group of Companies, which includes the Fund, Zooley and Fernland in addition to Capital Suisse, Inc., Capital Suisse Securities, Inc. and Zooley of Utah, Inc. *See Hentsch Henchoz & CIE v. Gubbay*, ---P.3d---, 2004 WL 1753372 (Utah 2004).

Yo, MAURICIO PARDO MORALES, Notario del Ilustre Colegio de Granada, con residencia en Marbella, LEGITIMO la firma, sin entrar en el contenido del documento, de DON PHILIPPE DONALD DAVID GUBBAY, con Tarjeta de Identidad Belga numero 980378303039, por haber sido estampada en mi presencia.

Marbella a 30 de Agosto de 2004.

[SEAL]

Exhibit 1

Court of first instance and instruction n° 2 of Marbella

Avda. Mayorazgo n° 14
Tel: 952-77-32-92 Fax: 052-82-07-91.
Deparment: E
Proceedings: committal proceedings 1346/2000
On: fraud
Of: Nora Patricia Balzarotti de Julián
Against: Philip David Gubbay y Jonathan B. Stables

Mr. Alfonso Llamas Soubrier, Secretary of the Court of Instruction number 2 of Marbella.

I certify: That in the criminal proceedings followed in this court number 1346/2000 on fraud has been issued the following order

ORDER

In Marbella, 15th of May 2001

Facts

The lawyer of the accuser Mrs. Nora Julián, has appeared before this court asking for the issue of an order to the bank ABN AMRO BANK, whose main offices are in Amsterdam, with branches in Madrid and in Gibraltar, as well as in New York (USA), where the company CAPITAL SUISSE S.A., and PHILIP DONALD DAVID GUBBAY, hold or held accounts, in order for these bank to proceed to the freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets existing in favour of the persons or companies which are included in the ruling of this order, or on which they have powers, whatever the form of administration may be.

To provide this court with all the information existing on the bank accounts, deposits of securities, bonds, shares, public

debt, security boxes or other financial assets, and on any other they might have held, although they might now be cancelled, included all the transfers carried out from these or other accounts, providing the numbers of these, addressee banks and beneficiaries of them, as holders or authorized persons, having to hand all the supporting documentation, in particular relating to the opening of the same, statements of operations, details of direct debiting or correspondence or any other that might be of interest for the investigation.

To authorize the lawyer Mr. Luis Juega Garcia, to obtain from said banks any other complementary information or documentation he considers necessary to pursue the operations that are known and are of interest for the investigation.

To revoke the transfer orders and orders of purchase of assets, pending to be executed, may they be temporary or permanent, being the bank obliged to inform this court on the presentation of bills of exchange, cheques or other presented for payment.

Legal Grounds

FIRST.—The preventive measures in criminal proceedings, respond to the necessity to ensure the efficiency of the future judgement of the judicial organ and have an instrumental or subordinated character with respect to the definitive resolution on the merits of the case, being essentially temporary, being related to the proceedings they are connected to being pending—ATC 13.40/1987, of 9th of December. The adoption of said measures corresponds to the judicial organs competent to resolve the proceedings that motivate them. They are regulated in various norms, as are arts. 334ff. of the LECr. under the heading body of the crime, interpreting the jurisprudence what is to be understood as this in a wide sense, as all materialities relatively permanent on which or with which has been committed the crime, as well as any other thing that is immediate effect of the crime or refers to it in such a way

that it may be used to prove it—STS 6.2. 82-. Likewise, art. 13 of the LECr. establishes as one of the first measure to protect the victim.

SECOND.—In the present case and in view of the results of the investigations of the Police, it is proper to approve the measures the appearing lawyer has asked for and which will be described in the ruling of this resolution.

RULING

It is ordered the freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets existing in favour of the persons or companies which are included in the ruling of this order, or on which they have powers, whatever the form of administration may be.

To provide this court with all the information existing on the bank accounts, deposits of securities, bonds, shares, public debt, security boxes or other financial assets, and on any other they might have held, although they might now be cancelled, included all the transfers carried out from these or other accounts, providing the numbers of these, addressee banks and beneficiaries of them, as holders or authorized persons, having to hand all the supporting documentation, in particular relating to the opening of the same, statements of operations, details of direct debiting or correspondence or any other that might be of interest for the investigation.

To authorize the lawyer Mr. Luis Juega Garcia, to obtain from said banks any other complementary information or documentation he considers necessary to pursue the operations that are known and are of interest for the investigation.

Likewise are revoked the transfer orders and orders of purchase of assets, pending to be executed, may they be temporary or permanent, being the bank obliged to inform this court on the presentation of bills of exchange, cheques or

other presented for payment.

All of this with relation to the following persons and companies:

PHILLIP DONALD DAVID GUBBAY with NIE X-1992018-B

ZOOLEY SERVICES LIMITED

PERICIA S.L.

CAPITAL SUISSE S.A.

The public prosecutor and the other parties of the proceedings are to be informed on this resolution and on the possibility to appeal against it to this court within 3 days.

This is what decides and signs Blanca Esther Diez Garcia, judge of court number 2 of Marbella. I give faith.

The above coincides exactly with its original to which I refer and I sign the present in Marbella, on 17th of May of 2001. I give faith.

Court of first instance and instruction n° 2 of Marbella

Avda. Mayorazgo n° 14
Tel: 952-77-32-92 Fax: 052-82-07-91.
Deparment: E
Proceedings: committal proceedings 1346/2000
On: fraud
Of: Nora Patricia Balzarotti de Julian
Against: Philip David Gubbay y Jonathan B. Stables

By virtue of the approved in the above mentioned proceedings, please find attached certification issued by the Secretary of the Court, of the order of preventive measures dictated, in order to serve you as order so you can proceed to see to its execution, having to inform the court on its outcome.

In Marbella, 15th of May 2001

The Judge

Director of ABN AMRO BANK

Exhibit 2

Court of first instance and instruction n° 2 of Marbella

Avda. Mayorazgo n° 14
Tel: 952-77-32-92 Fax: 052-82-07-91.
Deparment: E
Proceedings: committal proceedings 1346/2000
On: fraud
Of: Nora Patricia Balzarotti de Julián
Against: Philip David Gubbay y Jonathan B. Stables

By virtue of the approved in the above mentioned proceedings, please find attached certification issued by the Secretary of the Court, of the order of preventive measures dictated, in order to serve you as order so you can proceed to see to its execution, having to inform the court on its outcome.

In Marbella, 17th of May 2001

The Judge

Director of Wells Fargo Bank

Court of first instance and instruction n° 2 of Marbella

Avda. Mayorazgo n° 14
Tel: 952-77-32-92 Fax: 052-82-07-91.
Deparment: E
Proceedings: committal proceedings 1346/2000
On: fraud
Of: Nora Patricia Balzarotti de Julián
Against: Philip David Gubbay y Jonathan B. Stables

Mr. Alfonso Llamas Soubrier, Secretary of the Court of Instruction number 2 of Marbella.

I give faith: That in the criminal proceedings followed in this court number 1346/2000 on fraud has been issued the following order

ORDER

In Marbella,17th of May 2001

Facts

The lawyer of the accuser Mrs. Nora Julián, has appeared before this court asking for the issue of an order to the bank WELLS FARGO BANK in SALT LAKE CITY, and to ZIONS FIRST NATIONAL BANK or alternatively ZIONA FIRST NATIONAL BANK in the same city of the United States, as well as to the BANK OF AMERICA in the city of Las Vegas, State of Nevada of the same country, to which from the accounts of Gibraltar have been transferred funds and where the companies CAPITAL SUISSE S.A., ZOOLEY SERVICES LIMITED and PHILIP DONALD DAVID GUBBAY, hold or held accounts, in order for these banks to proceed to the freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets existing in favour of the persons or companies which are included in the ruling of this order, or on which they have powers, whatever the form of administration may be.

To provide this court with all the information existing on the bank accounts, deposits of securities, bonds, shares, public debt, security boxes or other financial assets, and on any other they might have held, although they might now be cancelled, included all the transfers carried out from these or other accounts, providing, the numbers of these, addressee banks and beneficiaries of them, as holders or authorized persons, having to hand all the supporting documentation, in particular relating to the opening of the same, statements of operations, details of direct debiting or correspondence or any other that might be of interest for the investigation.

To authorize the lawyer Mr. Luis Juega Garcia, to obtain from said banks any other complementary information or documentation he considers necessary to pursue the operations that are known and are of interest for the investigation.

To revoke the transfer orders and orders of purchase of assets, pending to be executed, may they be temporary or permanent, being the bank obliged to inform this court on the presentation of bills of exchange, cheques or other presented for payment.

Legal Grounds

FIRST.- The preventive measures in criminal proceedings, respond to the necessity to ensure the efficiency of the future judgement of the judicial organ and have an instrumental or subordinated character with respect to the definitive resolution on the merits of the case, being essentially temporary, being related to the proceedings they are connected to being pending—ATC 13.40/1987, of 9th of December. The adoption of said measures corresponds to the judicial organs competent to resolve the proceedings that motivate them. They are regulated in various norms, as are arts. 334ff. of the LECr. under the heading body of the crime, interpreting the jurisprudence what is to be understood as this in a wide sense, as all materialities relatively permanent on which or with which has been committed the crime, as well as any other thing that is immediate effect of the crime or refers to it in such a way that it may be used to prove it—STS 6.2.82-. Likewise, art 13 of the LECr. establishes as one of the first measure to protect the victim.

SECOND.- In the present case and in view of the results of the investigations of the Police, it is proper to approve the measures the appearing lawyer has asked for and all this in relation with the treaty on legal assistance in criminal matters signed between the kingdom of Spain and the United States of America, on 20th of November of 1990, ratified on 23rd of April 1993 and published in B.O.E. of 17th of March of 1993, having to be dealt with in the way foreseen in said treaty, with delivery of the corresponding orders to the petitioner so he can see to their execution, measures which will be said in the ruling of this resolution.

RULING

It is ordered the freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets existing in favour of the persons or companies which are included in the ruling of this order, or on which they have powers, whatever the form of administration may be, in the banks mentioned in the facts of this resolution.

To provide this court with all the information existing on the bank accounts, deposits of securities, bonds, shares, public debt, security boxes or other financial assets, and on any other they might have held, although they might now be cancelled, included all the transfers carried out from these or other accounts, providing the numbers of these, addressee banks and beneficiaries of them, as holders or authorized persons, having to hand all the supporting documentation, in particular relating to the opening of the same, statements of operations, details of direct debiting or correspondence or any other that might be of interest for the investigation.

To authorize the lawyer Mr. Luis Juega Garcia, to obtain from said banks any other complementary information or documentation he considers necessary to pursue the operations that are known and are of interest for the investigation.

Likewise are revoked the transfer orders and orders of purchase of assets, pending to be executed, may they be temporary or permanent, being the bank obliged to inform this court on the presentation of bills of exchange, cheques or other presented for payment.

All of this with relation to the following persons and companies:

PHILLIP DONALD DAVID GUBBAY with NIE
X-199201 8-B
ZOOLEY SERVICES LIMITED
PERICIA S.L.
CAPITAL SUISSE S.A.

The corresponding orders are to be issued, which will be handed to the appearing lawyer so he can see to their execution.

The public prosecutor and the other parties of the proceedings are to be informed on this resolution and on the possibility to appeal against it to this court within 3 days.

This is what decides and signs Blanca Esther Diez Garcia, judge of court number 2 of Marbella. I give faith.

Formality.- In the following the approved is complied with. I give faith.

The above coincides exactly with its original to which I refer and I sign the present in Marbella, on 17th of May of 2001.

Juzgado de Primera Instancia e Instrucción n° 2 de Marbella

Avda vlayorazgo n° 14
Telefono: 952-77-32-92 Fax: 952-82-07.91.
Necociado: E
Procedimiento: DIL.PREVIAS 1346/2000.
Sobre: ESTAFA
N.I.G.: 290650022000016 77.
De: NORA PATRICIA BALZAROTTI DE JULIAN
Contra: PHILIP DAVID GUBBAY y JONATHAN B. STABLES

En virtud de lò acordado en el procedimiento de referencia, ADJUN TO el remite certificacion expedida por el Sr. Secrertario del Juzgado, del auto de medidas cautelares dictado, a fin de que le sirva de mandamiento y proceda a su cumplimiento, debiendo da cuenrta a este Juzgado de su resultado.

En Marbella, a 17 de mayo de 2001.

EL/LA Magistrado-juez

SR. DIRECTOR DEL WELLS FARGO BANK

Juzgado de Primera Instancia e Instrucción n° 2 de Marbella

Avda Mayorazgo n° 14
DIL.PREVIAS 1346/2000
Ejecutoria n°:
Negociado: E
Número de Identificación General: 29065002200001677
De: NORA PATRICIA BALZAROTI7 DE JULIAN
Procurador/a;
Letrado/a:
Contra:
Procuradorla:
Letrado/a:

DON Alfonso LLamas Soubrier SECRETARIO DEL JUZGADO DE INSTRUCCION NUMERO Dos DE LOS DE Marbella.

DOY FE: Que en las que se siguen en este Juzgado con el número 1346/2000 sobre ESTAFA contra con domicilio en se ha dictado con esta fecha Auto que comprende el siguiente,

AUTO

En Marbella a diecisiete de Mayo de dos mil uno.

HECHOS

Por el Letrado de la denunciante DÑA NORA JULIAN, se ha realizado was comparecencia ante este Juzgado solicitando se libre mandamiento al Banco WELLS FARGO BANK en SALT LAKE CITY,y al ZIONS FIRST NATIONAL BANK o alternativamente ZIONA FIRST NATIONAL BANK en la misma Ciudad de los Estados Unidos, asi como en el BANK OF AMERICA en la Ciudad de Las Vegas, Estado de Nevada dell mismo Pais, a los que desde las cuentas de Gibraltar se han transferidos fondos y donde la empresa a CAPITAL SUISSE S.A., ZOOLEY SERVICES LIMITED y PHILIP DONALD DAVID GUBBAY, mantienen o mantenían cuentas, para que por parte de dichas entidades se proceda al

BLOQUEO Y EMBARGO PREVENTIVO de los saldos de las cuentas bancarias, depósitos de valores, títulos, acciones, deuda publica, contenido de cajas de seguridad, u otros activos financieros existentes a favor de las personas y sociedades que se incluirán en la parte dispositiva de esta resolución, sobre los que ostenten poderes, cualesquiera que sea la forma de administración.

Facilitar a este Juzgado, toda la información existente sobre las cuentas bancarias, depósitos, de valores, titulos, acciones, deuda publica, cajas de seguridad u otros activos financieros, y sobre cualquier otra que hubieran tenido, aunque en la actualidad se encuentren canceladas, incluido cuantas transferencias se hubiesen efectuado desde las mismas a otras cuentas, facilitando los númuros de estas, Bancos destinatarios y beneficiarios de ellas, bien sea como titulares o autorizados, debiendo entregar los soportes documentales correspondientes, en particular relativos a la apertura de las mismas, extractos de operaciones, datos de domiciliación o correspondencia y cualesquiera otros que pudieran ser útiles para la investigación.

Autorizar al Letrado D. LUIS JUEGA GARCIA a recabar de dicha Entidad bancaria cualquier otra información y documentación complementaria que consideren necesaria para realizar el seguimiento de las operaciones que se vayan conociendo y resulten de interés para la investigación.

Revocar las ordenes de transferencia y ordenes de compraventa de activos, pendientes de tramitación ya sean eventuates o permanentes, hacienda constar la obligación de la entidad de informar a este Juzgado sobre la presentación de efectos cambiarios, cheques u otros presentados al cobro.

RAZONAMIENTOS JURIDICOS

PRIMERO.- Las medidas cautelares en el proceso penal, responden a la necesidad o conveniencia de asegurar la efectividad del pronunciamiento futuro del órgano juris-

diccional y revisten un carácter instrumental o de subordinación respecto a la resolución definitiva sobre el fondo, siendo esencialmente temporales, guardando relación con la pendencia del proceso al que se conectan—ATC 1.340/1987, de 9 de diciembre-. La adopción de tales medidas corresponde a los órganos judiciales competentes para el conociniiento de las diligencias quo las motivan. y Su regulación se encuentra dispersa en diversas normas, como en los art. 334 ss. de la LECr. bajo el epigrafe cuerpo del delito, teniendo la jurisprudencia definido lo que se entiende par tal en sentido amplio, corn todas aquellas materialidades relativamente permanentes sobre las cuales o mediante las cuales se cometió, el delito, asi como cualquier otra cosa que sea efecto inmediato del delito mismo o que se refiera a él de tal modo que pueda ser utilizado para su prueba—STS 6.2.82-. Asimismo, el art. 13 de la LECr. Establece como una de las primeras diligencias la de dar protección, al perjudicado.

SEGUNDO.- En el presente caso y a la vista de los resultados de las investigaciones realizadas por la Policia, será procedente acordar las medidas que el Letrado que ha comparecido solicita y todo ello en relación con el tratado de Asistencia Jurídica mutua en materia penal suscrito entre el Reino de España y los Estados Unidos de America, de fecha 20/11/90, ratificado el 23/4/93 y publicado en el B.G.E. de 17/3/93, debiéndose cursar en la forma prevista en dicho tratado, con entrega de los correspondientes mandamientos al solicitante para que cuide de su diligenciamiento, medidas que se dirá en la parte dispositiva de esta resolutión.

PARTE DISPOSITIVA

SE DECRETA EL BLOQUEO Y EMBARGO PREVENTIVO de los saldos de las cuentas bancarias, depósitos de valores, titulos, acciones, deuda publica, contenido de cajas de seguridad, u otros activos financieros existentes a favor de las personas y sociedades que se incluirán en la parte

dispositiva de esta resolutión, sobre los que ostenten poderes, cualesquiera que sea la forma de administración en las Entidades Bancarias. que se mencionan en los hechos de esta Resolución.

Que se facilite a este Juzgado, toda la información existente sabre las cuentas bancarias, depósitos, de valores, titulos, acciones, deuda publica, cajas de seguridad u otros activos financieros, y sobre cualquier otra que hubieran tenido, aunque en la actualidad se encuentren canceladas, incluido cuantas transferencias se hubiesen efectuado desde las mismas a otras cuentas, facilitando los números, de estas, Bancos destinatarios y beneficiarios de ellas, bien sea coma titulares o autorizados, debiendo entregar los soportes documentales correspondientes, en particular relativos a la apertura de las mismas, acto, extractos de operaciones, datos de domiciliación o correspondencia y cualesquiera otros que pudieran ser útiles para la investigatión.

Autorizar al Letrado D. LUIS JUEGA GARCIA a recabar de dicha Entidad bancaria cualquier otra información y documentación complementaria que consideren necesaria para realizar el seguimiento de las operaciones que se vayan conociendo y resulten de interés para la investigación.

Asimismo se revocan las ordenes de transferencia y ordenes de compraventa de activos, pendientes de tramitación ya sean eventuales o pennanentes, debiendo esa entidad informar a este Juzgado sobre la presentación de efectos cambiarios, cheques u otros presentados al cobro.

Todo ello en relacion a las siguientes personas fisicas y juridicas:

PHILLIP DONALD DAVID GUBBAY con NIE X-1992018-B
ZOOLEY SERVICES LIMITED
PERICIA S.L.
CAPITAL SUISSE S.A.

Librense los correspondientes despachos, que se entregaran al Letrado que ha comparecido para su diligenciamiento.

PÓNGASE ESTA RESOLUCION EN CONOCIMIENTO DEL MINISTERIO FISCAL Y DEMAS PARTES PERSONADAS, previniéndoles que contra la misma podrán interponer, ante este Juzgado, RECURSO DE REFORMA en el plazo de TRES DIAS.

Asi lo acuerda, manda y firma D. Blanca Esther Diez García, Magistrado-juez del Juzgado de Primera Instancia e Instrucción n° 2 de Marbella y su partido.- Doy fe.

DILIGENCIA.- Seguidamente se cumple to acordado. Doy fe.

Lo preinserto concuerda bien y fielmente con su original al que me remito y para que conste ysirva de mandamiento en forma extierdo [Illegible] presente en Marbella, a diecisiete de mavo de dos mil uno. Doy fe.

Exhibit 3

JUZGADO DE PRIMERA INSTANCIA E INSTRUCCION NUMERO 2 DE MARBELLA

Avda Mayorazgo n° 14
Telefono: 952-11-32-92. Fax: 952-82-07-91.
Procedimieato: DIL.PREVIAS 1346/2000. Negociado: E
N.J.G.: 2906941 P20002601677.
De: HENTSCH HENCHOZ Y CIA, JARMO RAIMO HELENIUS y NORA PATRICIA BALZAROTTI DE JULIAN
Procurador/a: LEAL ARAGONCILLO, GUILLERMO, LIMA MONTRO, FRANCISCO
Letrado/a:
Contra: PHILIP DAVID GUBBAY y JONATHAN B. STABLES
Procurador/a: RIVAS AREALES, JOSE LUIS
Letrado/a:

AUTO

En Marbella a seis de marzo de dos mil dos.

HECHOS

Por el procurador D. José Luis Riva's Areales presentó escrito en fecha 9 de enero del 2.002, por el que solicitaba el sobreseimiento respecto de los hechos denunciados por Doña Nora de Julián; por providencia de la misma fecha se dio traslado at Ministerio Fiscal, evacuado dicho traslado informo en el sentido que obra unido a las actuaciones.-

RAZONAMIENTOS JURIDICOS

A la vista del informe emitido por el Ministerio Fiscal quien de forma clata determina que los hechos denunciado por Doña Nora de Julian, sin perjuicio de quo los mismos pudieran ser constitutivos de infracción penal, dada las circunstancias concurrentes en el sentido de que los mismos acontecieron fuera del territorio espoñol, y tratandose de

personas que no son nacionalcs de España es claro que no concurren ninguno de los presupuestos para entender que la competencia correponde a los Tribunales Español, asi el Minsiterio Fiscal informa y criteria compartido por esta Instructora que los hechos no se han llevacla a efecto .en España. Está funcedo sobre la obteneión de diversos capitales de ciertos inversores, canalizados a traves de la Sra. DE Julian que se hacen llegar a la entidad que regenta el. Sr. Stabbes, en GRan Bretaña, a, sin que hay tenido participacción alguno territorial ni matrialmente el territorio español. No consta que aqui se haya vencido de la voluntad de la "perjudicada para hacerla desprenderse de los capitales que maneja, por más que puedan existir relaciones entre las entidades señuelo (International inmobiliarie y Zooley) con la española Capital Suisse, relaciones que no influen en la determinación competencial.

Una vez aclarado tal extrerno y lógicamente no cabe entender competente a los tribunales españoles para el conocimiento de dicho asunto, es necesaria hacer referencia a la solicitud de la misma parte procesal que instaba a levantar las medidas cautelares adoptadas, en el presente caso dicha respuesta ha de ser negativa, por cuanto a tenor del conternido del Ministerio Fiscal en el que claramente informa que de to actuado hasta ahora se desprende que los hechos podrían ser constitutivos de un delito de estafa especialmente en to referente a los hechos denunciados por Henscht Hechoz, en tanto que el mismo hizo una inversión y cuando ha pretendido rescatar lo invertido se le sastiface con unas acciones cuya valoración es más que dudosa, es por ello que existiendo elementos por el momento para entender que los hechos son constitutivos de infracción penal sin perjuicio de la necesidad de practicar nuevas diligencias no procede por el momenta levantar las medidas cautelares adoptadas y a resultar de los hechos que se investigan.

PARTE DISPOSITIVA

ESTIMAR INCOMPETENTE ESTE JUZGADO DE MARBELLA PARA LA INSTRUCCION DE LA DENUNCIA INTERPUESTA POR NORA PATRICIA BALZAROTTI DE JULIAN, at haber ocurrido los hechos fuera del territorio español.

NO HA LUGAR A LEVANTAR LAS MEDIDAS CAUTELARES ADOPTADAS EN FECHA 15 Y 17 DE MAYO DEL 2.001.-

PONGASE ESTA RESOLUCION EN CONOCIMIENTO DEL MINISTERIO FISCAL Y DEMAS PARTES PERSONADAS, previniéndoles que contra la misma podran interposer, ante este Juzgado, RECURSO DE REFORMA en el plazo de TRES DIAS.

Asi to acuerda, manda y firma D. MARIA JESUS ALARCON BARCOS Magistrado-juez del JUZGADO DE PRIMERA INSTANCIA B INSTRUCCION NUMERO 2 DE MARBELLA y su partido.- Doy fe.

DILIGENCIA.- Seguidamente se cumple lo acordado, Doy fe.

SWORN TRANSLATION

COURT OF FIRST INSTANCE AND MAGISTRATES COURT N° 2 OF MARBELLA
Avda Mayorazgo if 14, Telephone 952 77 32 92, Fax 952 82 07 91
Type of Proceedings: Pre-trial proceedings n° 1346/2000.
Section: E
N.I.G. 2906941 P20002001677
Filed by: HENTSCH HENCHOZ & Co., JARMO RAIMO HELENIUS and NORA PATRICIA BALZAROTTI JULIAN
Court Solicitor: LEAL ARAGONCILLO, GUILLERMO, LIMA MONTERO, FRANCISCO
Lawyer:
Against: PHILIP DAVID GUBBAY, JONATHAN B. STABLES
Court Solicitor: RIVAS AREALERS, JOSE LUIS
Lawyer:

RULING

In Marbella, on the sixth of March, two thousand and two

FACTS

The court solicitor, Mr. Jose Luis Rivas Areales filed a writ on the 9th January 2002 in which he asked for the dismissal of the action in view of the claims made by Mrs. Nora de Julian; this was transferred by court order on the same date to the Public Prosecutor's Office, and once effected I inform as appears attached to the proceedings.

LEGAL REASONINGS

In view of the report issued by the Public Prosecutor who clearly sets out that the facts reported by Mrs. Nora de Julián, notwithstanding the fact that they themselves might constitute a criminal offence, due to the circumstances present in the sense that they occurred outside of Spanish territory and concerning persons who are not of Spanish nationality, it is

evident that none of the suppositions are present whereby this could be construed as being the competence of the Spanish Courts; thus the Public Prosecutor has informed and this Judge shares his opinion, that the facts have not occurred in Spain. It is based on the obtaining of capital from certain investments, channelled through Mrs. De Julián, and that reach the company run by Mr. Stabbes in Great Britain, without any participation regarding territory or material in Spain. There is no mention here that the will of the "injured party" has been overcome to make him/her part with the capital handled, however many relations might exist between the decoy companies (International Inmobiliaria and Zooley) and the Spanish company Capital Suisse, as these relationships do not influence the setting of jurisdiction.

Having clarified that point and logically it cannot be considered the jurisdiction of the Spanish Courts to try this matter, we must refer to the request from the some party regarding the raising of the precautionary measures adopted, and in this case the answer must be negative in so much as in view of the content from the Public Prosecutor in which he clearly informs that from the events to date it is gathered that the facts could amount to fraud, particularly with regard to the facts denounced by Henscht Hechoz as he himself made an investment and when he tried to retrieve what he had invested, he was paid with shares of more than doubtful value, and for this reason, as there are aspects from which, for now, the facts could be construed as amounting to a criminal offence without detriment to the need to conduct new enquiries, it is not appropriate for the precautionary measures to be raised for the moment, pending the results of the facts that shall be investigated.

ORDER OF THE COURT

TO CONSIDER THIS COURT OF MARBELLA AS NOT HAVING JURISDICTION TO TRY THE ACCUSATION LODGED BY NORA PATRICIA BALZAROTTI DE JULIAN, as the facts had occurred outside of Spanish territory.

NO JUSTIFICATION FOR THE RAISING OF THE PRECAUTIONARY MEASURES ADOPTED ON 15TH AND 17TH MAY 2001.

THIS RULING IS COMMUNICATED TO THE PUBLIC PROSECUTOR AND TO THE OTHER PARTIES REPRESENTED, informing them that they may file an APPEAL FOR AMENDMENT in this Court, within the period of THREE DAYS.

Thus it is decided, ordered and signed by Mrs. MARIA JESUS ALARCON BARCOS, Judge of the Court of First Instance and Magistrates Court n° 2 of Marbella and its district. In witness whereof I append my signature.

PROCEDURE: The ruling shall be enforced. In witness whereof I append my signature.

I, Karen MIEJIMOLLE, Official Translator of English/ Spanish, appointed by the Ministry of Foreign Affairs and authorised to sign official translations in any part of Spain,

Do hereby certify that the above is a true and complete translation into ENGLISH of a document drawn up in SPANISH. This translation consists of Two pages that bear my signature and stamp.

In Marbella, on the 13th August 2004

[Logo]

Exhibit 4

JUZGADO DE PRIMERA INSTANCIA E INSTRUCCION NUMERO 2 DE MARBELLA

Avda Mayorazgo n° 14
Telefono: 952-77-32.92. Fax: 952-82-07-91.
Procedimieito: DIL.PREVIAS 1346/2000. Negociasio: E
N.I.G.: 2906941P20002001677.
De: HENTSCH HENCHOZ Y CIA, JARMO RAIMO HELENIUS y NORA PATRICIA BALZAROITI DE JULIAN
Procurador/a: LEAL ARAGONCILLO, GUILLERMO, LIMA MONTERO, FRANCISCO
Letrado/a;
Contra: PHILIP DAVID GUBBAY
Procurador/a: RIVAS AREALES, JOSÉ LUIS
Letrado/a:

AUTO

En Marbella a doce de marzo de dos mil dos.

HECHOS

Que en fecha 15 de Mayo del 2.001, se dicto auto por el que se acordaba decretar el bloqueo y embargo preventivo de los saldos y cuentas corrientes del imputado. D. Philip David Gubbay; Que por auto de fecha seis de Marzo del 2.002 se acordó mantener las medidas cautelares acordadas con anterioridad, y en providencia de la misma fecha se acordó librar comisión rogatoria a Gibraltar a fin de dar cumplimiento dicho auto.

RAZONAMIENTOS JURIDICOS

Dado que el auto de fecha 15 de Mayo de 2.001, se acordó el bloque y embargo preventivo de los saldos cuentas del Imputado D. Philip David Gubbay, y como quiera que por auto de fecha seis de Marzo 2002 se estimó incompetente para conocer del procedimiento seguido a instancia de Doña

Nora Patricia Balzarotti de Julia, no obstante se continua respecto al resto de las denuncias interpuestas, es claro que en orden a garautizar y preservar los dereobos de los demás perjudicados precede mantener subsistentes las media cautelar acordaba en fecha 15 de Mayo del 2.001, pues aún cuando dicha medida se acordó a instancia de la representación de la Sra. Nora Patricia, sin embargo actualmente y dado que efectivarente el imputado mantiene cuentas bancarias en Gilbraltar se considera pertinente librar la comisión rogatoria en cuanto que subsisten los motives que to acordaron si bien respecto a los demás perjudicados.

PARTE DISPOSITIVA

Mantener la Medida cautelar acordada por auto de fecha 15 de Mayo del 2,001, por subsistir los motivos que lo acordaron y para preservar los derechos de los perjudicados HENTSCH HENCHOZ Y JARMO RAIMO E. HELENIUS

PONGASE ESTA RESOLUCION EN CONOCIMIENTO DEL MINISTERIO FISCAL Y DEMAS PARTES PERSONADAS, previniéndoles que contra la misma podrán interponer, ante este Juzgado, RECURSO DE REFORMA en el plaza de TRES DIAS.

Asi lo acuerda, manda y firma D. MARIA JESUS ALARCON BARCOS Magistrado-juez en comisión de serivicios del JUZGADO DE PRIMERA INSTANCIA E INSTRUCCION NUMERO 2 DE MARBELLA y su partido. Doy fe.

DILIGENCIA.- Seguidamente se cumple lo aeordado. Doy fé.

* * * *

the precautionary measures to be raised for the moment, pending the results of the facts that shall be investigated.

ORDER OF THE COURT

TO CONSIDER THIS COURT OF MARBELLA AS NOT HAVING JURISDICTION TO TRY THE ACCUSATION LODGED BY NORA PATRICIA BALZAROTTI DE JULIAN, as the facts had occurred outside of Spanish territory.

NO JUSTIFICATION FOR THE RAISING OF THE PRECAUTIONARY MEASURE ADOPTED ON 15TH AND 17TH MAY 2001.

THIS RULING IS COMMUNICATED TO THE PUBLIC PROSECUTOR AND TO THE OTHER PARTIES REPRESENTED, informing them that they may file an APPEAL FOR AMENDMENT in this Court, within the period of THREE DAYS.

Thus it is decided, ordered signed by Mrs. MARIA JESUS ALARCON BARCOS, Judge of the Court of First Instance and Magistrates Court n° 2 of Marbella and its district. In witness whereof I append my signature.

PROCEDURE: The ruling shall be enforced. In witness whereof I append my signature.

I, Karen MIEJIMOLLE, Official Translator of English/ Spanish, appointed by the Ministry of Foreign Affairs and authorised to sign official translations in any part of Spain,

Do hereby certify that the above is a true and complete translation into ENGLISH of a document drawn up in SPANISH. This translation consists of Two pages that bear my signature and stamp.

In Marbella, on the 13th August 2004

[Seal]

SWORN TRANSLATION

COURT OF FIRST INSTANCE AND MAGISTRATES
COURT N° 2 OF MARBELLA

Avda Mayorazgo n° 14. Telephone 952 77 32 92. Fax 452 82 07 91
Type ay11'reetedings: Pretrial proceedings n° 1346/2000.
Section: E
N.I.G. 2906941 P20002001677
Fired by: HENTSCH HENCHOZ & Co., JARMO RAIMO HELENIUS and NORA PATRICIA BALZAROTTI DE JULIAN
Court Solicitor: LEAL ARAGONCILLO, GUILLERMO, LIMA MONTERO, FRANCISCO
Lawyer:
Against: PHILIP DAVID GUBBAY
Court Solicitor: RIVAS AREALERS, JOSE LUIS
Lawyer:

RULING

In Marbella, on the twelfth of March, two thousand and two

FACTS

That on the 15th May 2001, a ruling was passed whereby an order was issued for the freezing and provisional attachment of the balances and current accounts of the accused, Mr. Philip David Gubbay. That in the court order dated sixth March 2002 it was decided to maintain the precautionary measures adopted previously, and in a ruling on the same date it was decided to issue letters rogatory to Gibraltar in order to fulfil this court order.

LEGAL REASONINGS

In view of the court order dated 15th May 2001 that ordered the freezing and provisional attachment of the balances and accounts of the accused, Mr. Philip David Gubbay, and, as the court order dated 6th March 2002 it was considered not to

be the competence of the court to hear the case brought by Mrs. Nora Patricia Balzarotti de Julia, this however continues with respect to the accusations filed, it is evident that in order to guarantee and protect the rights of the other injured parties, it would be appropriate to maintain the precautionary measure ordered on the 15th May 2001 in force, because even though this measure was ordered on the motion of the representative of Mrs. Nora Patricia, at the present time and given that the accused holds bank accounts in Gibraltar, it is considered to be appropriate to issue letters rogatory insofar as the reasons for that order still subsist, although with respect to the other injured parties.

ORDER OF THE COURT

To maintain the precautionary measure ordered by the ruling passed on 15th May 2001, as the motives for the order still subsist and in order to protect the rights of the other injured parties MR. HENTSCH HENCHOZ and JARMO RAIMO E. HELENIUS.

[Seal]

THIS RULING IS COMMUNICATED TO THE PUBLIC PROSECUTOR AND TO THE OTHER PARTIES REPRESENTED, informing them that they may file an APPEAL FOR AMENDMENT in this Court, within the period of THREE DAYS.

Thus it is decided, ordered and signed by Mrs. MARIA JESUS ALARCON BARCOS, Judge of the Court of First Instance and Magistrates Court n° 2 of Marbella and its district. In witness whereof I append my signature.

PROCEDURE: The ruling shall be enforced. In witness whereof I append my signature.

I, Karen MIEJIMOLLE, Official Translator of English/ Spanish, appointed by the Ministry of Foreign Affairs and authorised to sign official translations in any part of Spain,

Do hereby certify that the above is a true and complete translation into ENGLISH of a document drawn up in SPANISH. This translation consists of TWO pages that bear my signature and Stamp.

In Marbella, on the 13th August 2004

[Seal]

APPENDIX J

IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

[Filed September 27, 2004]

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE,
Plaintiff,

vs.

PHILIPPE DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, AND JOHN DOES 1-10,
Defendants.

SECOND AFFIDAVIT OF PHILIP D. GUBBAY

Philippe D. Gubbay, being duly sworn, states as follows:

1. I am over twenty-one years old and am competent in all respects to make this Affidavit. I have personal knowledge of the facts stated herein.

2. I am a citizen of France and currently a resident of Spain.

3. I am a director of Fernland Limited ("Fernland"), which is a director of Capital Suisse, S.A. ("the Fund"), a foreign corporation.

4. I am also an officer and director of Zooley Services, Limited ("Zooley"), a foreign corporation.

5. The freezing injunctions entered by the Spanish Marbella Court on May 15, 2001 and May 17, 2001 in the action filed by Mrs. Nora de Julian, prompted Hentsch, Henchoz & Cie ("HH&C") to file both separate criminal and civil lawsuits against Capital Suisse and me on May 31, 2001 with the same Spanish Court, using the same lawyers as Mrs. Julian

6. On June 22, 2001, HH&C made misrepresentations both to the United States and Spanish courts and attempted to enforce one of the freezing injunctions issued in favor of Mrs. Julian. HH&C redacted Mrs. Julian's name from the injunctions and replaced it with its own in an attempt to represent to this Court that the injunctions were entered in its favor.

7. HH&C filed a verified complaint in the Third District Court of Utah on August 2, 2001 against Capital Suisse and me.

8. HH&C further filed a complaint against Capital Suisse and me in the jurisdiction of Gibraltar.

9. Mrs. Julian's case against Capital Suisse and me was dismissed by the Spanish Court on March 6, 2002. The freezing injunctions thereafter were entered in favor of HH&C.

10. During February 2002, Capital Suisse, as a result of the continued legal and financial pressures exercised upon it by HH&C and because of the Spanish freezing injunctions, became insolvent and was no longer able to maintain its personnel and operations overseas which involved approximately one hundred (100) persons (42 in Spain).

11. Because Capital Suisse was late on its payroll obligations to most of its employees, many of the employees attempted to exercise pressure on Capital Suisse and me in the courts and out of the courts.

12. As a result of this situation, a large amount of valuable information, equipment, documents, computers, money and other various assets were either stolen or destroyed or used by these employees to blackmail Capital Suisse and me for further money and/or compensation.

13. HH&C has encouraged and/or financed several of these employees to turn against Capital Suisse and cause it further damage. In fact, HH&C has offered all of Capital Suisse's employees that would turn against Capital Suisse free legal assistance. *See* Exh. 1 hereto, Affidavit of Don Juan Antonia Cozar Gil dated October 21, 2002.

14. I have recently returned to Utah all materials (includeing all documents, computers and other electronic data) in the possession and/or control of Capital Suisse and/or me that I could locate that were removed from Utah.

15. I was unable to locate (and Capital Suisse does not possess) any computer hard drives, floppy disks or other electronic data requested by HH&C.

16. I was unable to locate (and Capital Suisse does not possess) the information on "PetsMarketing, Inc." that Dave Smith claims in his Affidavit was sent to Spain.

17. Capital Suisse is in the process of suing the directors of PetsMarketing for fraud and theft of assets to the benefit of "Hartsville Group Inc.", the former subsidiary of PetsMarketing.

18. Capital Suisse's Chartered Accountants have witnesses and can attest to most of the facts represented herein. *See* Exhibit 2 hereto.

19. Capital Suisse and I have complied with all of the requirements issued by the Spanish Courts in proceedings to which HH&C is a party, in terms of accounting and financial information pertinent to those proceedings. HH&C has not requested any further discovery to the Spanish magistrates

and judges and has in fact, requested on June 2, 2004 that discovery be closed and a trial date be set as soon as possible.

Yo, **MAURICIO PARDO MORALES**, Notario del Ilustre Colegio de Granada, con residencia en Marbella, LEGITIMO la firma de **DON PHILIPPE DONALD DAVID GUBBAY**, con Tarjeta de Identidad Belga número 980378303039, por haber sido estampada en mi presencia.

Marbella a 27 de Septiembre de 2.004.

Exhibit 1

JUZGADO DE PRIMERA INSTANCIA E INSTRUCCION NUMERO 2 DE MARBELLA
Avda Mayorazgo n' 14
Teléfono: 952-77-32-92. Fax: 952-82-07-91.
Procedimiento: DIL.PREVIAS 1346/2000. Negociado: E

COMPARECENCIA

NOMBRE Y APELLIDOS: JUAN ANTONIO COZAR GIL
D.N.I./PASAPORTE: 27338723

YA CONSTAN

En Marbella, a veintidós de octubre de dos mil dos.

La persona arriba identificada comparece ante S.S. con mi asistencia y juramentado en forma legal DICE: Que se afirma y ratifica integramente en el contenido del escrito, presentado a su nombre con el num 8327, reconociendo como [ILLEGIBLE] de su puño y letra la firma y rubrica estampada en el mismo.

Leida y hallada [ILLEGIBLE] firma el compareciente [ILLEGIBLE], Doy fe.

DILIGENCIAS PREVIAS 1346/2.000

AL JUZGADO DE INSTRUCCIÓN Nº 2 DE MARBELLA

DON JUAN ANTONIO COZAR GIL, mayor de edad, con domicilio en Avda. de la Constitución 28, 5° B, San Pedro de Alcántara, Marbella y D.N.I.: 27.338.723-A, en mi propio nombre y derecho, comparezco y respetuosamente,

DIGO:

PRIMERO.- Que quien suscribe se personó en el presente procedimiento accediendo a la sugerencia de los letrados del Banco HHC, quienes me sugiñeron que unimie a ellos en la denuncia contra el Sr. Gubbay era la forma más rapida para cobrar unas cantidades que el Sr. Gubbay me adeudaba.

Que, como quiera que estos letrados me ofrecieron su asistencia juridica de forma gratuita, yo accedi a denunciar al Sr. Gubbay, en los términos que constan en mi denuncia.

Que fueron los propios abogados del Banco HHC, que tienen sus oficinas en el mismo edificio donde yo venia prestando mis servicios profesionales para la empresa Capital Suisse, S.L. (Edificio Manna Marbella, Avda. de Severo Ochoa nº 28), quienes redactaron la denuncia, que yo simplemente me limité a firmar.

Que yo no procedi a leer la denuncia, puesto que confiaba en que siendo ellos los abogados sabrian como hacerlo (puesto que yo les habia contado mi problema con el Sr. Gubbay).

Que posteńiormente he tenido plena conciencia de los hechos que figuran en mi denuncia, por lo que siendo FALSOS, y habiendo quebrantado mi confianza, dichos abogados han redactado una denuncia que no se ajusta a lo que pactamos, es por to que ME RETIRO Y DESISTO DE MI DENUNCIA.

SEGUNDO.- Que en relación a los hechos que constan en mi denuncia es cierto que ful empleado por el Sr. Gubbay.

Que la cantidad de 500.000 Ptas. que reclamaba en mi denuncia, se me adeudaba en concepto de Liquidación de Comisiones.

Dicha cantidad ya me ha sido liquidada por la empresa, por lo que ya no me queda nada que reclamar.

Que la empresa me ha explicado que el motivo de la tardanza a la hora de liquidar estas comisiones ha sido de tipo administrativo, puesto que desde que se trasladó la documentación y archivos informáticos de la oficina de la 4ª Planta a las actuales oficinas en la 2ª y 3ª planta, ha habido un cierto desorden, que ha impedido clarificar la situación con mayor prontitud.

Que en relación con el personal contratado por el Sr. Gubbay para trabajar para el grupo Capital Suisse recibia una extraordinaria formación impartida por T.C.I.. (Denver) y I.T.I Chicago y Nueva York) en EEUU. Concretamente yo estuve realizando un curso de "trading bursatil" de 6 meses de duracion, con estancia en EEUU completamente pagada por la empresa. Mi nivel de inglés es medio-alto.

Que la cantidad de 500.000 Ptas. que figura en el contrato con "Swiss Management Corporation LLC" obedece a la cuenta abierta por el Sr. Gubbay a quien suscribe, para que comenzara a operar en bolsa.

Que si bien es cierto que ìnicialmente comenzamos a trabajar realizando simulaciones en el departamento de trading, es rotundamente falso que esa fuese nuestra única ocupación durante los 3 años que estuve prestando mis servicios para el Sr. Gubbay y su grupo de empresas. Esa es una aseveración que de forma gratuita han añadido los abogados del banco HHC, y que yo no manifesté en ningún momento.

Que no es cierto que a los empleados que estábamos trabajando en la 4ª planta se nos solicitara que "*aparentáramos estar operando efectiva y realmente*", todos los empleados estábamos trabajando en lo que se nos habia encomendado.

Si se nos hubiera indicado que debiamos aparentar que estabamos haciendo algo que realmente no estabamos haciendo, yo hubiera sospechado que estábamos metidos en alga turbio o ilegal y habria abandonado inmediatamente dicha empresa.

En varias de las entrevistas que mantuve con los letrados del banco HHC se me insistió mucho sobre ese tema, y yo siempre contesté que estábamos trabajando realmente. Lo que consta en mi denuncia to pusieron los abogados de HHC, no to dije yo.

Es cierto que no se me habia abonado la nómina del mes de febrero y.la liquidación del mes de marzo de 2.002, y pensé que denunciar al Sr. Gubbay por ese motivo era la única forma de poder cobrar que me quedaba, puesto que por la via laboral no se habia conseguido nada.

Que lamento enormemente el perjuicio que haya podido causar al Sr. Gubbay con esta denuncia, de la que me retracto integramente.

Por todo to anteriormente expuesto,

SUPLICO AL JUZGADO: Que teniendo por presentado este escrito, se sirva admitirlo, y en su virtud, acuerde conforme se tiene por solicitado, y ME TENGA POR DESISTIDO Y APARTADO DE MI DENUNCIA, archivando las citadas actuaciones, en ste que a mi respecta.

Por ser de Justicia que pido en Marbella (Málaga), a 21 de Octubre de 2.002.

/s/ [ILLEGIBLE]
[ILLEGIBLE]

Case Number: 1346/2.000

TO THE COURT N°2 OF MARBELLA

I MR JUAN ANTONIO COZAR GIL, over 21, living at Avenue of the Constitution 28, 5°B, in San Pedro de Alcántara, Marbella with the following ID#: 27.338.723-A, acting in my own name and own right come forward with all the respect due to this court to:

SAY:

FIRSTLY.—That I joined this court action under the advice and recommendation of the lawyers of the bank HH&C who suggested that by joining the bank in its court action against Mr. Gubbay I was choosing the best and fastest route to recuperate the money I was owed.

Because they offered me free legal assistance I then accepted to sue Mr. Gubbay along the side of the bank in accordance with the content of my complaint

The lawyers of bank HH&C with no input of mine, who have their offices in the same building than the ones of Mr. Gubbay where I used to go to work for "Capital Suisse SL" (Edificio Marina Marbella, Avenue de Severo Ochoa n°28), drafted my complaint, that I simply signed.

I did not even read my complaint, since they were the professionals who knew how to do these things (since I had told them the problem I had with Mr. Gubbay).

I later discovered and understood the full meaning of the facts as described in my complaint, only to realize they were false and that I had been taken advantage of, that my trust had been betrayed. These lawyers had drafted a complaint that wasn't true and not in accordance with what we had agreed upon. THEREFORE I AM REQUESTING THE WITHDRAWAL OF MY COMPLAINT.

SECONDLY.- As far as my complaint is concerned, it is true that I was employed by Mr. Gubbay.

That the amount of 500.000 pesetas that I was owed in commissions have been paid back to me. Therefore I no longer have any further claims.

I have been told by the company that the reason why I had had to wait so long in getting paid was because of administrative reasons. This was mainly due to the fact that most of the documents and archives located on the fourth floor had to be transferred to the second and third floor of the building.

I also wish to state in relation to the staff employed by Mr. Gubbay with the view of performing various duties for the Capital Suisse group of companies that they were offered an outstanding career opportunity through special training with T.C.I (Denver) and I.T.I. (Chicago and New York) in the United States of America.

As a matter of fact I was sent to the United States of America on a six month training course as a trader on the stock exchange with everything paid for by Capital Suisse. My English is well above average.

The amount of 500.000 pesetas that appeared in my contract with "*Swiss Management Corporation LLC*" refers to the account opened by Mr. Gubbay for me so I could trade on the Stock Exchange.

If it is true that my colleagues and I started working as paper traders in the trading department of Capital Suisse. It is absolutely false that we dedicated all of our time doing nothing but that during the three years which lasted my employment. The lawyers of the bank invented this whole story. I never said that we were faking anything whilst being in the office.

It is not true that the employees working on the 4th floor were asked to act as thought they were doing something when

really they weren't doing anything. All of the employees were actively working at performing their respective duties.

Had we been asked to act or do anything that had no meaning I would have had doubts about the legitimacy of the business Capital Suisse was involved in and would have left the company immediately.

During the various meetings held with the lawyers of the bank HH&C they insisted on this specific point, but I would always tell them that we were performing genuine tasks and genuine work. What appears in my complaint in relation to this specific point was included by the lawyers of HH&C.

It is a fact that I was owed both salaries for February and March 2002 and I was led to believe that by suing Mr. Gubbay I was going to get my money considering the fact that my previous attempts through the normal legal channels had failed.

I deeply regret the damage I have caused Mr. Gubbay with this complaint that I am withdrawing in full.

I the light of what I have just stated,

I BEG THIS COURT: That further to this statement my complaint be completely withdrawn from its records.

Trusting that justice will be done. In Marbella (Málaga) on October 21, 2.002.

Exhibit 2

AL TRIBUNAL DE DISTRITO DEL TERCER DISTRITO JUDICIAL EN Y PARA EL CONDADO DE SALT LAKE, ESTADO DE UTAH

Caso Consolidado nº 010905355

Por la presente yo, José Diego Herrera Pérez, economista del Ilustre Colegio de Economistas de Málaga con el nº 2.753, vengo a realizar ante notario las siguientes afirmaciones.

1) Que conozco al Sr. Philippe Gubbay y al grupo de empresas Capital Suisse, especialmente las de nacionalidad española, ar alas que he venido realizando las labores propias de mi profesión de forma independiente.

2) Que tengo constancia de los embargos que sobre las mismas se impusieron tanto a nivel nacional como internacional.

3) Que como consecuencia de ellos se produjo una situación de asfixia econbmica que produjo una faits de liquidez que oblige) a dichas empresas al despido de la grin mayorla de sus trabajadores.

4) Que la reacción de algunos de ellos, at verse imposibilitados por los embargos a la hora de cobrar el importe de sus indemnizaciones por despido, fue la de apropiarse de material de todo tipo pertenecjente a la empresa. Asimismo, otros, retuvieron material y documentación de la empresa, suponemos que en concepto de retención, para no devolverlo si no se les pagaba cuarito se les adeudaba, situación que ha provocado un [ILLEGIBLE] enconado con los trabajadores que aún no ha sido resuelto.

5) Que sé que falta dicha documentación porque me ha sido muy dificil procedcr a realizar los estados contables de dichas empresas españolas debido a su ausencia.

6) Que desconozco quién , exactamente se ha apropiado del material o de los documentos, pero que estos se conservaban junto con la documentación que llegó de las oficinas de Salt Lake City, y que por tanto, es de suponer que también partee de la misina haya podido desaparecer por los mismos motives.

7) Que me consta que ha habido antiguos trabajadores que como acto de despecho se ban unido al banco HH&C en su denuncia contra Capital Suisse, ya que el mencionado banco ofreció asistencia juridica gratuita a los empleados de Capital Suisse si denunciaban los hechos, con la promesa de que de esa forma iban a cobrar más ripidamente,

8) Que según se me explica, no se ha podido proceder contra los posibles supuestos sustractores del material y documentación por la imposibilidad de financiar el numeroso volumen de cases que habria que incoar ante los tribunales.

De todo lo cual doy testimonio en Málaga, a veintitrés de septiembre de 2004.

[SEAL]

TO THE ATTENTION OF THE THIRD DISTRICT COURT
SALT LAKE SALT LAKE COUNTY,
STATE OF UTAH

Case Number n° 010905355

I hereby, Jose Diego Herrera Perez, Chartered Accountant and member of the college of Chartered Accountants of Malaga with the license number n° 2.753, I hereby come and declare the following before a notary:

1) I personally know Mr. Philippe Gubbay and the group of companies Capital Suisse, especially the Spanish entities because I have been performing accounting duties as an independent contractor for these corporations.

2) I know of the existence of the various freezing injunctions that were issued against these entities not only on a national scale but on an international scale.

3) And as a result of these freezing injunctions these companies were strangled financially to the extent that they became illiquid and had to fire most of their employees.

4) That the reaction of some of the workers, realizing that because of these freezing injunction they were not going to be paid their wages, salaries and expenses became violent. They decided to rob furniture, computers and equipment of any type belonging to the group of companies. Whilst others decided to take pieces of equipment, documents of the company, as down payment for the money that was owed, with the intention of not returning anything in the event they were not paid. This fight with the former employees and workers of Capital Suisse to this days still continues.

5) I know that these facts are true because, as accountant for the group, I know that a number of documents have gone missing and as a result of this I have experienced the greatest difficulties in completing financial statements for these companies.

6) That I do not know who exactly took the various assets and documents pertaining to the company. What I do know is that these documents and various items where located in the same premises where the boxes that were once sent from the offices of Salt Lake City remained. As a result of this I am not at all surprised to hear that possibly part of the documents and/or pieces of equipment sent from Salt Lake City could have suffered the same treatment.

7) That former employees of Capital Suisse in order to seek revenge have joined forces with HH&C in its complaint in Spain. The bank offered free legal assistance to anyone that would turn against Capital Suisse with the promise that by doing so they were going to get their money quicker.

8) That it has not been possible to prosecute the wrong doers who took away documents, equipment and various other items because of the financial burden and various problems it would have brought on the failing group should it had chosen to file that many claims.

Of all of this I bare testimony in Malaga on September 23, 2004

José Diego Herrera Pérez

APPENDIX K

LAW OFFICES
HATCH, JAMES & DODGE
A Professional Corporation
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone (801) 363-6363
Fax (801) 363-6666
September 3, 2004

VIA FACSIMILE
(801-521-6280)

Perrin R. Love
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111

Re: *Hentsch Henchoz & CIE v. Gubbay, Case No. 010905355*

Dear Perrin:

We have received today from Capital Suisse all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation. Capital Suisse returned the documents to Utah in order to comply the Utah Supreme Court's recent requirement that Capital Suisse comply with all outstanding orders of the district court. It is our understanding that the district court's March 25, 2002 order requiring the return of these documents is the only outstanding order of the court.

The documents are available for your immediate review. Please contact us if and when you wish to review the documents.

Please do not hesitate to contact me with any question you may have regarding this matter.

Sincerely yours,

/s/ Brent O. Hatch
BRENT O. HATCH

APPENDIX L

LAW OFFICES
HATCH, JAMES & DODGE
A Professional Corporation
10 West Broadway, Suite 400
Salt Lake City, Utah 84101
Telephone (801) 363-6363
Fax (801) 363-6666
October 19, 2004

VIA HAND DELIVERY

Perrin R. Love
CLYDE SNOW SESSIONS & SWENSON
201 South Main Street, Suite 1300
Salt Lake City, Utah 84111

Re: *Hentsch Henchoz & CIE v. Gubbay, Case No. 010905355*

Dear Perrin:

As we stated in our telephone conversation with you yesterday, we have received from Capital Suisse copies of its audits and sets of accounts for the years 2000 and 2001. These documents were recently obtained from a disgruntled former employee of Capital Suisse who for an extended period refused to turn the documents over to Capital Suisse. In addition, Capital Suisse recently has located a copy of the hard drive data contained on the computer systems used in its Salt Lake City office. The hard drive data was located at the office of an attorney.

It is our understanding that your client already possesses significant portions of the information and documents your client claims in opposition to Capital Suisse's pending Motion before the trial court. Nevertheless, we have offered these additional materials for your inspection and review. In our telephone conversation of yesterday, you stated that you

have no intention to look at any of these additional documents. Please contact us if and when you change your mind and want to review the documents.

Sincerely yours,

/s/ Brent O. Hatch
BRENT O. HATCH

APPENDIX M

IN THE THIRD JUDICIAL DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILIPPE DAVID GUBBAY; CAPITAL SUISSE, S.A.; CAPITAL SUISSE SECURITIES, INC.; CAPITAL SUISSE, INC.; ZOOLEY OF UTAH, INC.; FERNLAND LIMITED; DOUGLAS P. HOYT; and JOHN DOES 1-10,

Defendants.

OCTOBER 20, 2004

BEFORE THE HONORABLE ANTHONY B. QUINN
District Court Judge.

HEARING

SALT LAKE CITY, UTAH

WEDNESDAY, OCTOBER 20, 2004, 9:10 A.M.
PROCEEDINGS

[3] THE COURT: HH&C vs. Philippe Gubbay, and if you'd like to state your appearances for the record, please, starting with the plaintiffs.

MR. LOVE: Perrin Love and Walter Romney for HH&C, Your Honor.

MR. HATCH: Your Honor, Brent Hatch and Mark Richards for the defendants.

THE COURT: Thank you. I've had a chance to now read that which has been submitted with respect to this case and, let me tell you, I view my obligation as pretty limited to responding to the three questions that the Supreme Court asked in this case. Those are: whether Capital Suisse has adequately complied with the orders of the District Court within 30 days from the issuance of this decision. Number two, the amount of the unsatisfied portion of the District Court's judgment, and three, whether Capital Suisse has posted an adequate bond in that amount.

It seems to me that these questions, at least some of them, potentially pose fact issues,

* * * *

[5] that since the order was made, there may be documents, computer, hard drives, floppy disks, etc., that have—that disappeared with employees, for various reasons.

So, I guess my initial though is, that is not adequate compliance with the orders of the Court. The fact that it may not now be possible to comply with the Court order does not mean that the order has been adequately complied with.

There doesn't seem—with respect to the second question, there doesn't seem to be any dispute with respect to the amount of a judgment. Plaintiffs have set forth a number of 27 million and change, and I don't read in the documents any—any dispute with respect to that.

The third question of whether Credit Suisse has adequately posted a bond, no bond has been posted, and as I understand the defendants' position, their view is that a bond really isn't required. There's no stay being sought here, and the defen—plaintiffs can go ahead and execute on their judgment, but that isn't what the Supreme Court said. The Supreme Court said that as a condition of not dismissing the appeal, they were requiring posting the bond in the amount of the

* * * *

[34] we've tried to make as to discovery, and as to impossibility on the bond, is something that I should not have to go up without.

THE COURT: Alright, thank you.

MR. HATCH: Thank you very much, Your Honor.

THE COURT: I think I need to put my decision in context. And, that context is, the decision of the Supreme Court which, as I read the opinion, was sorely tempted to simply dismiss the appeal. But, out of a sense that there ought to be one last chance, they fashioned a remedy which gave the defendants 30 days to come into complete compliance. And, I think that my job is simply to focus on the 30 days, and answer the questions as best I can, and that's what I'm going to do.

With respect to question 1, whether the defendants were in full compliance with the court orders, I'm going to find that they weren't. I think that, at a minimum, the discovery orders required supplementation of the interrogatories and requests for production of documents. That—it is undisputed that that did not happen within 30 days. It has, arguably, happened since, but [35] I'm not in a position to determine whether there has been full compliance outside the 30 days. That hasn't been briefed to me. I haven't seen the answers, and I don't know, but I think I can say, with some confidence, since it was done since, that it wasn't done within the 30 days. And, so, that order has not been fully complied with.

With respect to whether other materials were brought back in Salt Lake—brought back to Salt Lake. I have the representation that they were. On the other side, I have the affidavit, and I think his name was Mr. Smith, wasn't it, that originally was—

GENTLEMAN: [inaudible] Smith, Your Honor.

THE COURT: Yeah, was employed by the defendant; who describes what was taken. And, I have the representations of Mr. Love and his group, who have reviewed what has come back, and compared it with the Smith affidavit, and tells me that it's not all there.

There's been some other things that have been sent back to Utah outside the 30 days, but I think that based on that, I can safely find [36] that the order to bring everything back to Salt Lake within 30 days was not complied with, just simply on the basis that in the first go round, there was no hard drives that were brought back, where Mr. Smith clearly states, there were hard drives that were sent out of Utah, originally.

It doesn't seem to me that there's any dispute with respect to the—question 2, which is the unsatisfied portion of the judgment. I find it to be $27,868,098.63.

And, finally, as to whether there's been any bond posted, I find that there hasn't been.

The plaintiffs have proposed an order in this case, which I think is completely appropriate in answering the issues posed by the Supreme Court, and I'm simply going to sign the order. The arguments that you're making, Mr. Hatch, I think are arguments that are better made before the Supreme Court.

Anything else, counsel?

GENTLEMAN: No, Your Honor. Nothing else.

THE COURT: Alright.

GENTLEMAN: Thank you, Your Honor.

No. 04-1365

Supreme Court, U.S.
FILED
JUN 3 - 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURTITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Petitioners,

v.

HENTSCH HENCHOZ & CIE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Utah

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 3, 2005

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

Whether the Utah Supreme Court in its discretion may dismiss an appeal because of appellants' wilful disobedience of district and appellate court orders and the appellants' failure to remedy the violations as a condition to a decision on the merits of the appeal?

CORPORATE DISCLOSURE STATEMENT

No publicly-held corporation owns any stock in respondent. Respondent Hentsch Henchoz & Cie, a private banking partnership organized under the laws of Switzerland, merged in 2002 with Lombard Odier Darier Hentsch & Cie, a private banking partnership organized under the laws of Switzerland. No parent corporation owns any stock in respondent.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Hentsch Henchoz & Cie ("HH&C") respectfully submits this Brief in Opposition to the Petition for a Writ of Certiorari ("Petition") filed by petitioners Capital Suisse, Inc., Capital Suisse, S.A., Zooley Services, Ltd., Zooley of Utah, Inc., Fernland Limited, and Philippe D. David Gubbay (collectively "Capital Suisse").

COUNTERSTATEMENT OF THE CASE

The Petition represents the culmination of Capital Suisse's concerted efforts to perfect and preserve its theft of $25 million from HH&C. Between December 2000 and March 2001, HH&C wired nearly $25 million to the Gibralter account of Capital Suisse, S.A., a purported "Mutual Fund for the Professional Investor," headquartered in Marbella, Spain. Capital Suisse, however, ultimately proved to be a sham; HH&C's money was never invested, but transferred from the Gibralter account to accounts in Salt Lake City, Utah, and wired throughout the world to Capital Suisse's principals, family and friends.

To trace and recover its $25 million, HH&C invoked the assistance of the Spanish courts, and then the Utah courts. Capital Suisse steadfastly refused to provide information to enable HH&C to trace or recover its money, eventually (i) removing documents maintained in its Utah office to Spain, (ii) defying orders of the Utah district court to answer HH&C's interrogatories and document requests, and to return the documents from Spain to Utah, and (iii)

refusing to recognize the jurisdiction of the Utah courts or to participate in the litigation further.

After the district court granted summary judgment on HH&C's claims against Capital Suisse (in the amount of $24,730,000.00 plus interest), Capital Suisse attempted to resurrect the jurisdiction of the Utah courts by appealing an earlier decision of the district court denying Capital Suisse's Motion to Dismiss HH&C's Verified Complaint for improper venue. The Utah Supreme Court, however, stayed the appeal until Capital Suisse complied with two conditions: (i) post a bond in the amount of the judgment, and (ii) comply with the outstanding orders of the district court within thirty days.

Capital Suisse did neither. Capital Suisse did not post a bond, did not return all documents from Spain, did not adequately answer HH&C's interrogatories (many of which were intended to trace HH&C's money), and did not produce documents maintained in Marbella, Spain. Nonetheless, Capital Suisse sought a "Certification," first in the district court and then in the Utah Supreme Court, that it had made a "good faith" attempt to comply with the conditions. The Utah Supreme Court invited further briefing, and then dismissed Capital Suisse's appeal per curiam, because Capital Suisse "failed to comply with this court's decision." (Petitioner's Appendix ("Pet. App.") 18a).

Now, Capital Suisse petitions this Court for a Writ of Certiorari. Contrary to the Petition, this case does not present an opportunity "to resolve two separate conflicts regarding a court's ability, consistent with due process and equal protection principles, to deprive a party of its right to appeal based upon the party's inability to comply with court-imposed conditions on that right." (Petition ("Pet.")

at 3). For the following reasons, this Court should deny the Petition:

First, this "opportunity" was never presented to the Utah Supreme Court, in violation of this Court's Rule 14.1(g)(i). None of the arguments in the Petition were ever presented below. Capital Suisse made a passing, generic reference to "due process" in its Certification before the Utah Supreme Court, but made no assertion that imposition of a bond that it claimed it had no ability to pay raised a *federal* Due Process Clause claim, and cited no authority at all to support such a claim. Further, Capital Suisse never even invoked the words "equal protection," much less raised a *federal* Equal Protection Clause claim before the Utah Supreme Court.

Second, the Petition ignores an independent ground for dismissal of the appeal. The Petition focuses almost exclusively on Capital Suisse's claimed "inability" to post a bond for the amount of the judgment, but ignores the independent ground on which dismissal of the appeal rested – Capital Suisse's refusal or failure to comply with the outstanding orders of the district court.

Third, there is no conflict between the Utah Supreme Court decision and the Second Circuit decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). In *Pennzoil*, the Second Circuit enjoined application of a Texas statute that required an appellant *in all cases* to post a supersedeas bond as a condition of an appeal. *Id.* at 1156. The Second Circuit held this mandatory or "inflexible" requirement, without regard to the appellant's ability to pay, violated the Due Process Clause of the United States Constitution. *Id.* at 1154.

The Utah Supreme Court, on the other hand, fashioned "a remedy that is fair and just under the circumstances, taking into account the facts of the particular case," and dismissed the appeal only after it gave Capital Suisse an opportunity to "show cause" why the appeal should not be dismissed. This Court and numerous state courts have upheld the authority and the right of an appellate court to dismiss the appeal of an appellant who stands in contempt of the district court. That principle was never addressed in the Second Circuit *Pennzoil* decision. Finally, the conflict, if any, is not significant because both *Pennzoil* and this case are unique and factbound.

1. The Initial State Court Proceedings.

The first decision of the Utah Supreme Court thoroughly and accurately presents the factual basis necessary for this Court's determination of the Petition. (Pet. App. 1a-6a). However, certain facts not addressed in the Utah Supreme Court decision were erroneously presented in the Petition. First, the Petition incorrectly alleges that in lieu of redeeming HH&C's shares in the Capital Suisse Fund, that "Capital Suisse offered to provide HH&C valuable stock in a related company." (Pet. 5). In fact, these shares were worthless shares in a company called PetsMarketing, Inc., offered to HH&C as part of Capital Suisse's fraud. (Pet. App. 47a; Respondent's Appendix ("Resp. App.") 5b-7b). The district court specifically found that:

> [The] Capital Suisse Defendants misrepresented to HH&C, and to this Court, the value of the PetsMarketing shares purportedly transferred to HH&C at over $30 million. In fact, those shares had virtually no market or market value. Moreover, the Capital Suisse defendants themselves manipulated the trading in PetsMarketing, Inc.

> to boost artificially the publicly-quoted price of PetsMarketing, Inc. shares.

(Pet. App. 47a).

The Petition also incorrectly asserts that "because Capital Suisse could no longer afford office space in Utah, it moved its records to Spain – with full disclosure to the court and plaintiffs." (Pet. 7). This statement is flatly untrue and is squarely contrary to the record. It is clear from the record that the materials were removed from Utah to Spain to evade production. (Pet. App. 47a-48a; Resp. App. 3b-4b). Capital Suisse's agent in Utah, on advice of his counsel, refused to participate in shipping the documents and other materials to Spain to avoid possibly obstructing justice. (Resp. App. 3b-4b). Moreover, neither the district court nor HH&C was aware that the documents had been shipped to Spain. (Pet. App. 23a-25a; 47a-48a). When the district court ordered Capital Suisse to return the materials to Utah and make them available for discovery, Capital Suisse refused to comply with the district court's order and abandoned its defense of the litigation. (Pet. App. 48a). As the district court ruled in granting HH&C summary judgment, "[t]his is not the conduct of legitimate business persons." *Id.*

2. The Utah Supreme Court's First Decision.

After the district court's entry of summary judgment, Capital Suisse appealed to the Utah Supreme Court on the sole ground that the district court erred in refusing to enforce a forum selection clause purportedly requiring the litigation to proceed in the British Virgin Islands. (Pet. App. 6a). The Utah Supreme Court did not reach this issue on the merits. Instead, it considered the threshold issue

raised and fully briefed by HH&C, whether the Utah Supreme Court "may dismiss a civil appeal when the appellant disobeys the orders of the district court in the same action." *Id.*

The Utah Supreme Court first noted that Capital Suisse's contemptuous conduct was clearly sufficient to dismiss the appeal outright:

> In the present case, Capital Suisse's defiance of district court orders is clearly sufficient to warrant dismissal of the appeal. Though not formally adjudged in contempt, Capital Suisse's wilful disobedience would certainly have been adequate to support an order of contempt had Capital Suisse not absented itself from the litigation. Capital Suisse repeatedly refused to comply with discovery requests from HH&C and went to extreme lengths to prevent access to the Zions and Wells Fargo bank accounts. Upon being ordered by the district court to comply with discovery, Capital Suisse shipped all of its documents, records, and computer hard drives from Utah to Spain. On the heels of this insubordination, upon being ordered to return the awol documents and other evidence, Capital Suisse abruptly withdrew from the litigation, claiming that the district court had no jurisdiction over it.

(Pet. App. 9a-10a).

Based upon well-reasoned authorities from numerous jurisdictions and its own plenary powers, the Utah Supreme Court unanimously concluded:

> [T]his court, in its discretion, may dismiss the appeals of appellants who have wilfully disobeyed an order of a lower court in the same action. We

> agree with the approach adopted by the court of appeals that allows the reviewing appellate court to exercise its discretionary authority by fashioning a remedy that is fair and just under the circumstances, taking into account the facts of the particular case. Such authority is indispensable since it would "violate[] the principles of justice to allow a party who flaunts the orders of the courts to seek judicial assistance" on appeal. *D'Aston*, 790 P.2d at 593 (citing *Stewart v. Stewart*, 91 Ariz. 356, 372 P.2d 697, 700 (1962); *Rude v. Rude*, 153 Cal.App.2d 243, 314 P.2d 226, 230 (1957); *Greenwood v. Greenwood*, 191 Conn. 309, 464 A.2d 771, 773 (1983); *Strange v. Strange*, 464 S.W.2d 216, 219 (Tex. Civ. App. 1970) (per curiam)).

(Pet. App. 8a-9a).

The Utah Supreme Court, in its discretion, fashioned a "fair and just [remedy] under the facts and circumstances of the particular case." (Pet. App. 12a-13a). The Court ruled:

> Accordingly, we hereby stay this appeal to allow Capital Suisse time to comply with the following conditions, which must be fulfilled before we will entertain the appeal on the merits. First, Capital Suisse must, within thirty days from the date of this decision, bring itself into compliance with the orders of the district court in this matter, including those orders requiring Capital Suisse to comply with discovery and to return all of the requested documents and evidence to Utah. Second, inasmuch as we are concerned that any continued delay will lead to the further dissipation of Capital Suisse's assets, we also require Capital Suisse to post bond with the district

> court in the amount of any unsatisfied portion of the judgment that has been entered against it.

(Pet. App. 13a).

The Utah Supreme Court remanded the matter to the district court to make the following relevant determinations: "(1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; . . . and (3) whether Capital Suisse has posted an adequate bond in that amount [of the outstanding judgment]." *Id.*

Finally, the Utah Supreme Court ordered that:

> Capital Suisse must, within ninety days, provide this court with notice that it has complied with these conditions, including the relevant orders of the district court regarding whether Capital Suisse has fulfilled the court's discovery orders within the allotted thirty-day time period and posted bond in the appropriate amount. If, at the end of ninety days, Capital Suisse has failed to comply with each of these requirements, or continues to resort to evasive or dilatory tactics, the appeal will be dismissed without further notice or argument.

Id.

3. The District Court's Decision on Remand.

After the expiration of the thirty day period prescribed by the Utah Supreme Court, the parties fully briefed the issue of whether Capital Suisse had complied with the specific conditions of the Utah Supreme Court. Following a hearing on the compliance issue, the district court entered its order determining that Capital Suisse had not complied

with the express conditions set forth in the Utah Supreme Court's decision. (Pet. App. 15a-17a).

4. The Utah Supreme Court's Final Decision of Dismissal.

Capital Suisse then filed a Certification of Good Faith Attempt to Comply with Court Order ("Certification") in the Utah Supreme Court. (Resp. App. 10b-27b). By order dated November 10, 2004, the Utah Supreme Court requested further briefing as to why it "should not dismiss" the appeal for Capital Suisse's "failure to comply" with the Court's prior decision. (Resp. App. 28b-29b). Capital Suisse told the Utah Supreme Court to regard its Certification as its "brief in response to the Court's Order to Show Cause." (Resp. App. 30b-31b). The Certification made only a fleeting reference to "due process," without specifying the United States or Utah Constitution, and made no mention at all of "equal protection."

HH&C filed a Brief in Opposition to Capital Suisse's Certification, with exhibits and affidavits, presenting evidence that Capital Suisse had not met the Utah Supreme Court's express conditions, and asserting that Capital Suisse's protestations of "good faith" were nothing more than one final attempt to preserve the fruits of its fraud and its wilful disobedience of the district court orders. (Resp. App. 32b-51b).

As to the condition that Capital Suisse post a bond, HH&C presented evidence that Capital Suisse had failed to show that it did not have the ability to post a bond in the full amount of the judgment. HH&C demonstrated that none of HH&C's $25 million was subject to the orders of the Spanish Court freezing Capital Suisse's accounts in

Gibralter and Spain, because Capital Suisse initially had wired HH&C's money out of those accounts in violation of the Spanish Court orders. (Resp. App. 37b-41b). HH&C argued that, because Capital Suisse had also wired HH&C's $25 million out of the Salt Lake City accounts and beyond the jurisdiction of the Utah (or American) courts to enforce a judgment, a bond in the full amount of the judgment was the only meaningful remedy available to HH&C. *Id.*

As to the condition that Capital Suisse comply with the outstanding orders of the district court, HH&C presented evidence that Capital Suisse had not made a good faith effort to return all documents from Spain, and had not made a good faith effort to answer HH&C's interrogatories or to produce documents. (Resp. App. 42b-50b). HH&C presented evidence that Capital Suisse's responses were patently deficient because Capital Suisse asserted that the information subject to the interrogatories could be ascertained from the records returned to Utah. *Id.* Those records were incomplete, were more than three years old, and did not provide the most fundamental information repeatedly requested by HH&C – such as the current location of HH&C's $25 million. HH&C argued that Capital Suisse's discovery responses were a bad-faith continuation of its steadfast obstruction of HH&C's attempts to trace or to recover its money, and its wilful disobedience of the district court orders. *Id.*

By Order dated January 11, 2005, the Utah Supreme Court dismissed Capital Suisse's appeal *per curiam*, because Capital Suisse "failed to comply with this court's decision in the above-captioned matter."

REASONS FOR DENYING THE PETITION

I. THE CLAIMED FEDERAL CONSTITUTIONAL ISSUES WERE NOT PROPERLY RAISED BELOW AND, FOR THAT REASON, WERE NOT DISCUSSED, ANALYZED NOR DECIDED BY THE UTAH SUPREME COURT.

Capital Suisse bases its Petition on the assertion that the Utah Supreme Court's discretion in dealing with Capital Suisse's repeated recalcitrance violates the Due Process and Equal Protection Clauses of the United States Constitution. These federal constitutional claims were not adequately raised below or sufficiently addressed by the Utah Supreme Court to make this case worthy of certiorari review.

A. Capital Suisse Ignores the Requirements of Rule 14.1(g)(i).

Supreme Court Rule 14.1(g)(i) requires a petitioner to specify the stage of state-court proceedings in which the federal questions sought to be reviewed were raised and the way the questions were passed on by the state courts. Rule 14.1(g)(i) requires in pertinent part:

> If review of a state-court judgment is sought, specification of the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears . . . so as to show that the federal question was

> timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14.1(g)(i).

Contrary to the mandates of Rule 14.1(g)(i) which the Petition ignores, the federal constitutional issues sought by Capital Suisse to be reviewed by this Court were not timely and properly raised in the Utah courts. Therefore, this Court should decline to exercise jurisdiction to review the judgment on a writ of certiorari. *Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("[W]e have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review."). *See also Hill v. California*, 401 U.S. 797, 805 (1971); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 n.16 (1983) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions.") (quoting *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969)); 28 U.S.C. § 1257(a) (1993) (in order for the Court to have jurisdiction to issue a writ of certiorari a federal Constitutional right must have been "specially set up or claimed").

B. Capital Suisse Only Fleetingly Raised a Generic Due Process Issue Below and Only Upon Remand to the District Court.

In its initial briefing to the Utah Supreme Court, Capital Suisse did not raise any due process issue. It failed to do so despite the fact that HH&C argued that the appeal should be dismissed because of Capital Suisse's

wilful disobedience of the district court's orders and, also, that a bond was necessary to prevent further dissipation of Capital Suisse's assets. In its Reply Brief to the Utah Supreme Court, Capital Suisse argued that it has a "substantive right to appeal," but did not argue that dismissal of the appeal for its contemptuous conduct, or requiring the imposition of a bond, would violate due process. (Pet. App. 12a).

After remand, Capital Suisse argued in its Certification to the Utah Supreme Court that it had made a good faith attempt to comply with the Utah Supreme Court's conditions. Capital Suisse made only a single, fleeting reference, without citation to any authority, to generic due process:

> Absent a finding by this Court that the bond requirement has been satisfied in light of the Spanish Court's orders, or, at a minimum removing the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and has been, in effect, condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. Capital Suisse therefore requests that the Court hold the bond is sufficiently satisfied.

(Resp. App. 19b).

Capital Suisse cited no authority to support this reference and made no other due process arguments. Thus, Capital Suisse did not raise its federal claims with "fair precision and in due time." *Adams*, 520 U.S. at 88. This Court has consistently determined that an isolated citation to a federal issue in the midst of an unrelated argument is insufficient. *Id.*; *Bd. of Dirs. of Rotary Int'l v.*

Rotary Club of Duarte, 481 U.S. 537, 550 n.9 (1987). *See also Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988) ("generic reference" to Fourteenth Amendment insufficient to preserve a constitutional claim); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77-78 (1988) (vague appeal to constitutional principles does not preserve constitutional claim).

Capital Suisse's passing reference to "due process" did not even specify a federal or state constitutional issue. As this Court explained in *Adams*:

> [T]he passing invocations of "due process" we found [in petitioners' state court reply brief] fail to cite the Federal Constitution or any cases relying on the Fourteenth Amendment, but could have just as easily referred to the due process guarantee of the Alabama Constitution and thus did not meet our minimal requirement that it must be clear that a *federal* claim was presented.

520 U.S. at 89 n.3 (emphasis in original) (citations omitted). *See also Bankers Life*, 486 U.S. at 77-78 ("[A]t the minimum there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)) (emphasis in original)).

The Petition now relies primarily upon the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), as the authority for its due process argument. However, Capital Suisse never cited the *Pennzoil* case to the Utah Supreme Court as authority for a violation of due

process – even after the district court had determined that Capital Suisse had not complied with the Utah Supreme Court's conditions. Capital Suisse's only citation below to the Second Circuit's *Pennzoil* decision was for the narrow proposition that "a judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be secure . . . from loss resulting from the stay of execution." (Resp. App. 15b-16b). Capital Suisse did not cite *Pennzoil* for the proposition that a bond imposed on a contemptuous appellant violates the Due Process Clause if an appellant cannot pay it. *See Adams*, 520 U.S. at 88 ("The discussion of 'a federal case, in the midst of an unrelated argument, is insufficient to inform a state court that it has been presented with a claim.'" (quoting *Bd. of Dirs. of Rotary Int'l*, 481 U.S. at 550 n.9)).

Additionally, Capital Suisse never raised any due process challenge to the Utah Supreme Court's condition that Capital Suisse comply with the outstanding discovery orders of the district court. As a result, the Utah Supreme Court never addressed the *Pennzoil* decision or fully analyzed the due process issue.

This Court is faced with the same situation as in *Adams* and *Bankers Life*. The Petition makes no reference to where and how the due process issue was timely and properly preserved, as required by Rule 14.1(g)(i). Even after being invited by the Utah Supreme Court to submit additional briefing after remand, Capital Suisse failed to do so. (Resp. App. 28b-29b; 30b-31b). Despite this opportunity to raise a federal Due Process Clause claim, Capital Suisse did not do so, and the issue was not determined by the Utah Supreme Court. Therefore, this is not a proper case, factually or legally, for certiorari review on the due process issue asserted in the Petition.

C. Capital Suisse Did Not Raise the Equal Protection Issue Below.

This Court should not review Capital Suisse's assertion that the Utah Supreme Court decision conflicts with federal Equal Protection Clause precedents established by several state courts and this Court. The Petition makes no reference to raising equal protection, state or federal, in either the district court or in the Utah Supreme Court because Capital Suisse never did so. *See* Rule 14.1(g)(i). For this reason, in this case the Utah Supreme Court has not construed, nor interpreted, the federal Equal Protection Clause in a manner that could be inconsistent with the decision or precedent of any other court. Moreover, the cases cited in the Petition purportedly conflicting with the Utah Supreme Court's opinions (Pet. 20-21) were not raised nor cited below and are clearly distinguishable as they do not involve the situation where an appellate court, in its discretion, requires a bond from a contemptuous appellant in order to reach the merits of the appeal. As a result, for the same reasons discussed in sections I.A. and I.B., *supra*, the Petition should be denied.

II. THIS CASE IS INAPPROPRIATE FOR CERTIORARI REVIEW SINCE CAPITAL SUISSE'S VIOLATIONS OF THE DISCOVERY ORDERS ARE FACTUALLY AND LEGALLY INDEPENDENT BASES FOR DISMISSAL OF THE APPEAL BY THE UTAH SUPREME COURT.

Based on Capital Suisse's wilful disobedience of the district court's discovery orders and a concern that Capital Suisse would continue to resort to evasive and dilatory tactics, the Utah Supreme Court imposed two conditions on Capital Suisse: fully comply with the outstanding

orders of the district court within thirty days, including returning all documents removed from Utah to Spain and answering HH&C's outstanding interrogatories and document requests, and post a bond in the amount of the judgment. (Pet. App. 13a). Despite the Utah Supreme Court's imposition of *two* conditions, the Petition focuses almost exclusively on the condition requiring the posting of a bond.

The parties submitted extensive briefing to the district court concerning Capital Suisse's purported "good faith" compliance with the Utah Supreme Court's mandate. After review of the memoranda and after a hearing, the district court determined that Capital Suisse had not complied with the requirements of the Utah Supreme Court, specifically holding that Capital Suisse "failed to respond to Plaintiff's discovery requests as ordered." (Pet. App. 16a). Capital Suisse merely repeated the arguments made to the district court in its Certification to the Utah Supreme Court after the district court issued its order and determination. (Resp. App. 10b-27b).

At no time did Capital Suisse assert that its wilful disobedience to the district court's orders, or its failure to cure its contemptuous conduct, raised any federal constitutional issue. The Petition remains silent about this alternative basis for dismissing the appeal: Capital Suisse's failure to respond to HH&C's outstanding discovery. This independent basis for the Utah Supreme Court's decision to dismiss the appeal makes this case unworthy of certiorari review.

III. THERE IS NO GENUINE CONFLICT BETWEEN THE DECISION OF THE UTAH SUPREME COURT AND THE CASES CITED IN THE PETITION.

The Petition argues that Utah Supreme Court's decisions conflict with the nearly twenty-year-old decision of the Second Circuit in *Pennzoil*, but the Petition does not point to cases in any other jurisdiction addressing the specific due process issue raised in *Pennzoil*. Further, there is no conflict between the Utah Supreme Court's dismissal of Capital Suisse's appeal and the *Pennzoil* case.

A. The Second Circuit *Pennzoil* Decision.

The Petition rests its assertion of an "important due process issue" (Pet. at 12) almost entirely on an alleged conflict between the Utah Supreme Court decisions and the Second Circuit opinion in *Pennzoil*. (Pet. 12-16). However, the Second Circuit's decision in *Pennzoil* is both factually and legally distinguishable from this case. *Pennzoil* did not address the power of a state appellate court to dismiss an appeal of a contemptuous appellant. Instead, the issue of the Second Circuit, on which Capital Suisse relies, was whether Rule 364 of the Texas Rules of Civil Procedure violated Texaco's due process right to appeal because its mandatory and inflexible application to all appeals deprived Texaco of due process. *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987).

In the instant case there is no "inflexible" statutory requirement at issue. In fact, the Utah Supreme Court crafted a flexible remedy to address Capital Suisse's wilful disobedience to discovery orders. Relying on precedent

from this Court and a number of other jurisdictions, the Utah Supreme Court correctly held an appellant does not have an absolute right of appeal after engaging in repeated wilfully disobedient and contemptuous conduct. (Pet. App. 12a) ("the right of appeal is not absolute and may be forfeited"). Unlike the mandatory bond requirement statutorily imposed in *Pennzoil*, the Utah Supreme Court's approach is a "fair and just" approach "under the facts and circumstances" of this particular case. (Pet. App. 13a).

B. On Certiorari Review of the Second Circuit Opinion in *Pennzoil*, This Court Emphasized that an Appellate Court has Inherent Authority to Remedy Contempt.

In *Texaco, Inc. v. Pennzoil Co.*, 481 U.S. 1 (1987), this Court reversed the Second Circuit, holding that the *Younger* abstention doctrine prohibited the Second Circuit from considering constitutional claims that had not been presented to the Texas courts, much like the claims in this case had not been presented to the Utah Supreme Court. *See id.*, 481 U.S. at 16-17. The majority Opinion, therefore, did not address the due process issue.

However, this Court's decision emphasized the importance of the individual states controlling their contempt procedures. This Court noted that neither the federal district court nor the Second Circuit "applied the appropriate standard in determining whether adequate relief was available in the Texas courts." 481 U.S. at 10. In so ruling, this Court confirmed a state's interest in vindicating its contempt power:

> This Court repeatedly has recognized that the States have important interests in administering certain aspects of their judicial systems. [citations omitted] In *Juidice v. Vail*, 430 U.S. 327 (1977), we held that a federal court should have abstained from adjudicating a challenge to a State's contempt process. The Court's reasoning in that case informs our decision today:
>
> > "A State's interest in the contempt process, through which it vindicates the regular operation of its judicial system, so long as that system itself affords the opportunity to pursue federal claims within it, is surely an important interest. Perhaps it is not quite as important as the State's interest in the enforcement of its criminal law, *Younger, supra*, or even its interest in the maintenance of a quasi-criminal proceeding such as was involved in *Huffman, supra*. But we think it is of sufficiently great import to require application of the principles of those cases."

481 U.S. at 12-13 (quoting *Juidice*, 430 U.S. at 335). This Court emphasized that the contempt power "stands in aid of the authority of the judicial system, so that its orders and judgments are not rendered nugatory." *Id.* at 13 (quoting *Juidice*, 430 U.S. at 336 n.12).

The Utah Supreme Court did nothing more than vindicate Utah's important interests in administering it own judicial system by fashioning a fair and just remedy to deal with a contemptuous and defiant appellant. This comports with this Court's opinion in *Pennzoil* recognizing

the right of States to control their own contempt procedures.

C. The Utah Supreme Court's Decision Relied Upon, and is Fully Consistent With, the Precedent of This Court and a Myriad of Other Courts.

Capital Suisse claims that the Utah Supreme Court added a "judicial gloss to the constitutional right to appeal by stating that 'it is not absolute and the right may be forfeited, or a valid appeal may be dismissed, due to the acts or omissions of the appellant.'" (Pet. 9, quoting (Pet. App. 12a)). This "judicial gloss" is well-founded in the precedents of this Court. In reaching its decision, the Utah Supreme Court cited this Court's ruling in the *National Union* case:

> [T]he United States Supreme Court has held that dismissing the appeal of an appellant who wilfully defies court orders does not violate due process, but rather, may be a "reasonable means of safeguarding the collectibility of [a] judgment." *Nat'l Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37, 41, 43-44 (1954) ("While a statutory review is important and must be exercised without discrimination, such a review is not a requirement of due process.").

(Pet. App. 12a).

In *National Union*, this Court upheld the authority of a state court to dismiss an appeal because of an appellant's actions to frustrate the effectiveness of a judgment. This Court noted:

> While this Court has not, until now, passed upon the constitutionality of a state court's dismissal of an appeal in a case like the present, it has decided somewhat comparable issues. Where the subject matter of litigation has been removed or has removed itself from the jurisdiction of a state court in violation of that court's orders, this Court has upheld a dismissal of the offending litigant's appeal.

348 U.S. at 43.

The Petition unsuccessfully attempts to distinguish *National Union* in a footnote, stating that *National Union* does not "control the outcome of this case" because (i) the *National Union* petitioner "did not make a good faith effort to comply with the lower court's bond order," and (ii) because the state of Washington, unlike Utah, does not provide a constitutional right to appeal in civil cases. (Pet. 17 n.3). The differences are insignificant because the Utah Supreme Court, as well as the district court, decided that Capital Suisse's "good faith" efforts were insufficient to comply with the district court's prior discovery orders. After rejecting Capital Suisse's "good faith" arguments, the Utah Supreme Court dismissed the appeal. Further, the *National Union* decision was not based on a state granted constitutional right of appeal, and did not suggest that the outcome would have been any different if the Washington State Constitution provided for an absolute right of appeal in civil cases. The Petition ignores the clear holding in *National Union*: dismissal of an appellant's appeal does not violate due process when the appellant defies a lower court's orders. 348 U.S. at 45. *See also Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 350-54 (1909) (holding trial court's striking of pleadings and entry of default judgment did not violate due process when the

party refused to comply with discovery orders); *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976) (upholding dismissal of complaint as a sanction for plaintiff's failure to comply with discovery orders and answer interrogatories) (per curiam). Consistent with this Court's prior rulings, the Utah Supreme Court correctly dismissed Capital Suisse's appeal as result of its contemptuous conduct.

D. The Purported Conflict is Totally Insignificant.

Nearly twenty years have passed since the Second Circuit opinion in *Pennzoil*. As the Petition readily illustrates, few courts have faced the issue involved in *Pennzoil*. In fact, the Second Circuit recognized that the scope and precedential value of its decision was limited:

> We hasten to note that our decision rests partly upon the extraordinary circumstances of this case, which are unlikely ever again to recur: a private civil money judgment in an amount unprecedented in the annals of legal history, a clear inability on the part of the judgment debtor to comply with a state law mandating a bond in the full amount of the judgment pending appeal, the prospect that the state appellate court would not rule on the constitutionality of the state law before the judgment creditor acted to enforce the judgment, and the likelihood that immediate enforcement of the Texas lien and bond provisions would lead to irreversible destruction of the debtor before its appeal could be heard and decided on the merits, thus robbing its right of appeal of any meaning and effect. For these reasons our decision, like that of the Fifth Circuit in

> *Henry v. First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980), is obviously a narrow one in its scope and application.

Texaco, Inc. v. Pennzoil Co., 784 F.2d 1133, 1157 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987). Even stretched to the extreme, the Utah Supreme Court's decision presents no important conflict with the Second Circuit's decision in *Pennzoil* requiring review by this Court.

Nor would granting the Petition provide any appreciable assistance to the lower courts. The Petition suggests that the issues presented "are of national significance." (Pet. 23). However, Capital Suisse reaches this conclusion by merely stating that "the right to appeal a decision of a state trial court [] is found in state constitutions across the country." *Id.* Capital Suisse's conclusory statement does not make this case worthy of certiorari review. Like the Second Circuit's decision in *Pennzoil*, the circumstances of this case are unique. Despite Capital Suisse's argument that the Utah Supreme Court acted "arbitrarily," the Supreme Court found, based upon a review of specific conduct, that Capital Suisse wilfully disobeyed the lower court's orders. (Pet. App. 10a). Such a conclusion was well reasoned based upon the wilful conduct of Capital Suisse. Therefore, the risk that any "federal or state court" would arbitrarily "extinguish" appeal rights is non-existent. Since the purported conflict is insignificant, the Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted this 3rd day of June, 2005.

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IN THE DISTRICT COURT OF THE
THIRD JUDICIAL DISTRICT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

In the Matter of: The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against: **Philip David Gubbay** Court of First Instance and Instruction No. 2 Marbella Court No. 1346/2000	**AFFIDAVIT OF DAVE E. SMITH** Consolidated Case No. 010905355 Judge Ronald E. Nehring
HENTSCH HENCHOZ & CIE, Plaintiff vs. PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE, INC., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10, Defendants.	

STATE OF UTAH)
: ss
COUNTY OF SALT LAKE)

Dave E. Smith, after being duly sworn under oath, states as follows:

1. I am a resident of the state of Utah. My home address is 12378 South Margaret Rose Drive, Riverton, Utah 84065. I am a Certified Public Accountant ("CPA").

2. I am represented by James R. Holbrook of Callister, Nebeker & McCullough, with regard to this affidavit.

3. I was employed with members of the Capital Suisse Group of Companies (the "Capital Suisse Group") from December 1, 1999, through April 1, 2002, when I resigned. During that time, I held the following positions: Chief Financial Officer ("CFO"), Executive Vice President and Director of Capital Suisse Management, Director, Secretary and Controller of Zooley of Utah, Inc., Controller of Capital Suisse, Inc. and Treasurer of Capital Suisse Securities. My proposed written employment agreement was with Capital Suisse, Inc. In my experience, it was common for Capital Suisse Group employees and officers frequently to change titles and positions within the group.

4. My job duties with the Capital Suisse Group included, among other things, maintaining the financial records and books of Capital Suisse, Inc. and Zooley of Utah, Inc. ("Zooley of Utah"), executing wire transfers and cashiers checks on behalf of these companies, and managing their bank accounts, including the accounts at

Zions First National Bank ("Zions Bank") and Wells Fargo Bank (collectively, the "Utah accounts").

5. In addition, I was the Registered Agent in Utah for PetsMarketing, Inc. ("PetsMarketing") and, for a period of time I was the Controller for PetsMarketing. PetsMarketing conducted all of its operations through its wholly owned subsidiary, PetsMarketing Insurance.com Agency, Inc. ("PMIA"), an Ohio corporation. In my capacity as Controller, I was in charge of the accounts payable and accounting and made payments and disbursements on behalf of PMIA from two Utah bank accounts in its name at Zions Bank.

6. In each of positions I held (as set forth above), I reported to and took instructions directly from Philip [sic] D. David Gubbay ("Gubbay") and considered him to by my ultimate supervisor. Every time I wired significant assets out from the Utah accounts, I did so upon written or telephonic instructions of Gubbay that were faxed from Spain (or elsewhere) to me at the offices of Capital Suisse, Inc. and Zooley of Utah (the "Utah offices"), located at 15 South Temple Street, Salt Lake City, Utah.

7. In early January 2002, Gubbay requested that I remove from the Utah offices and send to Spain all documents and computer data maintained there. After consultation with my lawyer, I refused to do so because I was concerned that complying with those directions would constitute an obstruction of justice in light of the ongoing litigation before this court. I advised Gubbay that I would not comply. Several days later, on January 13, 2002, Andrew Yurcho ("Yurcho"), who is the U.S. in-house counsel and the head of the San Diego office for the Capital Suisse Group of Companies, and Harrison

Beal ("Beal"), the Secretary of Capital Suisse Management, traveled from San Diego to Utah. On January 14, 2002, Yurcho and/or Beal met with Holme Roberts & Owen. On January 15, 2002, Yurcho and Beal removed from the Utah offices all documents and computer data (*i.e.*, computer hard drives) maintained there. I took a leave of absence so that I would not be present when the removal occurred. Among the documents removed were:

a. All books and financial records of Capital Suisse, Inc. and Zooley of Utah;

b. All written instructions from Gubbay directing wire transfers or other disbursements from the Utah accounts;

c. All written and e-mail communications between officers and employees of the Capital Suisse Group in Spain and officers and employees of the Capital Suisse Group in Utah.

8. In reviewing the Verified Complaint and being familiar with the subject matter thereof, many of the documents and data removed from Utah would have directly related to HH&C's claims, including for example:

a. The wire transfer instructions directly from Gubbay;

b. E-mails from myself and others, including Douglas P. Hoyt ("Hoty") and Edward B. Stonehocker ("Stonehocker") concerning the Fund's representations on its website about the Net Asset Value ("NAV") representations concerning independent auditors, representations concerning the role of the Utah office as Administrator of the Fund;

c. Documents corroborating that letters were dictated from Spain, even when sent from Utah;

d. E-mails and other documents showing how and why Gubbay orchestrated the reverse merger for PetsMarketing, as described below.

9. Neither I nor Hoyt nor Stonehocker or anyone else in the Salt Lake City offices of the Capital Suisse Group of companies prepared any net asset valuations for Capital Suisse, S.A.

10. Based on my personal knowledge and involvement with PetsMarketing, including review of certain documents, I can represent that on or about March 20, 2000, in accordance with instructions from Douglas Hoyt (an in-house counsel for the Capital Suisse Group), who was acting on instructions from Gubbay, PetsMarketing which is a Delaware corporation. On or about March 27, 2000, PMIA was incorporated as an Ohio corporation; PMIA subsequently became a wholly-owned subsidiary of PetsMarketing. On or about June 19, 2000, acting on instructions from Gubbay, I opened an account at Zions Bank for PMIA. I was the signatory for that account and was responsible for disbursements necessary for PMIA to conduct day-to-day business; I obtained permission from Gubbay before making large disbursements. On or about August 30, 2000, PetsMarketing had its first private placement of shares. Of the 18,512,000 shares issued, Zooley Services obtained 16,000,000, making it the majority owner of PetsMarketing. In exchange for those shares, Zooley Services transferred to PMIA its portfolio of health insurance policies for family pets. Zooley Services had previously

acquired the portfolio through the bankruptcy proceedings for PetsHealth, an earlier company in the business of selling medical insurance for pets, in which Zooley Services had an interest.

11. Gubbay, acting directly and through Zooley Services, hired Russell Smith (the former President of PetsHealth) as the President of PetsMarketing and Robert Cashman (also a former director of PetsHealth) as the Secretary of PetsMarketing.

12. Yurcho, through Equitrade Securities, Inc. ("Equitrade"), tried to obtain permission from the NASD to quote PetsMarketing on the Pink Sheets LLC ("Pink Sheets") by filing a Form 15c-211 with the NASD. The NASD, however, rejected the Equitrade Form 15c-211 as deficient. Consequently, in April 2001, Gubbay instructed Yurcho who informed me and others that PetsMarketing needed to undergo a reverse merger with LifeSoft, a public shell corporation, *i.e.*, only LifeSoft would survive the merger and be re-named PetsMarketing. Because LifeSoft was already eligible to be quoted in the Pink sheets, it would be possible after the merger for the LifeSoft shares, now called "PetsMarketing" shares, to be quoted in the Pink Sheets. Thus, the merger circumvented the requirement that a new Form 15c-211 be filed in order for PetsMarketing shares to be quoted in the Pink Sheets. LifeSoft was dormant before the merger, and was revived for the purpose of allowing PetsMarketing shares to be quoted on the Pink Sheets notwithstanding the NASD's concerns with Equitrade's Form 15c-211.

13. As part of the reverse merger, Zooley Services was given another nine (9) million share of PetsMarketing,

bringing its ownership total to 25 million shares, or over sixty percent (60%) of the outstanding shares.

14. Nerja Communications ("Nerja"), a company owned actually by Gubbay and nominally operated by Beal (the Secretary of Capital Suisse Management), used its trading account at Equitrade Securities, Inc., a broker-dealer in Orange County, California, to periodically purchase small amounts PetsMarketing shares at prices from approximately $8.00 to $10 per share. To fund Nerja's purchases of PetsMarketing, I wired money, acting on instructions from Gubbay, from the Utah accounts to MJK Clearing, the clearing firm for Equitrade.

15. Included among the wire transfers that I made, or am aware of, from the Utah accounts upon written instructions from Gubbay were:

a. $181,050 to Gubbay's father, Donald Gubbay, in Manley;

b. $250,00 to Gubbay's wife, Veronique Gubbay, another $750,000 to Swiss Finance, S.I., and another $155,000 to Ophir Properties, Limited;

c. $150,000 to Gubbay's sister, Denyse Anne Pentecost, in New Calendonia;

d. $1,027,356 to Marianne Zenger, a sales agent of the Capital Suisse Group, in Spain and Switzerland;

e. $7,291,666 to pseudonym accounts code name "Koukouk" in Switzerland and the Guernsey Islands that I later determined were beneficially owned by Willy Zenger, who is Marianne Zenger's father;

f. $501,000 to Terrence Vandeveld, the Managing director of Capital Suisse Securities, who is also Marianne Zenger's brother-in-law;

g. $1,520,000 to Capital Suisse Management, parent of Capital Suisse Securities;

h. $112,000 to Transmeridian, Inc. for the benefit of William Slivka, the President of Capital Suisse Securities;

i. $75,000 to the Charleston Group for the benefit of Robert Cashman, Secretary of Capital Suisse Securities;

j. $300,042 to Andrew Yurcho, in-house counsel for the Capital Suisse Group;

k. $96,000 to the Maro Group for the benefit of Roy Lerman, Head of Marketing for the Capital Suisse Group;

l. $328,750 to Yves George Larielle, a Vice President of Capital Swisse Group, in Gibraltar;

m. $464,230 to Tul Intervest in Gibraltar, Larielle is sole signatory to account;

n. $315,000 to Elite Trading in Gibraltar, Larielle is sole signatory on account;

o. $75,000 to Holme Roberts & Owen;

p. $367,566 to Mark Hendricks, a General Counsel and Senior Vice President of the Capital Suisse Group of companies; and

q. $252,000 to Norja Communications, In.c, the company that bought PetsMarketing stock as set forth above.

r. $4.95 million to Donald Gubbay in Vanuaru ($4.5 sent by Douglas P. Hoyt).

These amounts total $19,161,660.00.

DATED this 22nd day of May 2002.

/s/ Dave E. Smith
Dave E. Smith
AFFIANT

SUBSCRIBED AND SWORN TO before me this 22nd day of May 2002.

/s/ Dawn M. Hales
NOTARY PUBLIC

NOTARY PUBLIC
DAWN M. HALES
4095 S. Kifferney Circle
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My Commission Expires
February 3, 2004
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IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE, Plaintiff, vs. PHILIPPE DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, AND JOHN DOES 1-10, Defendants.	**CERTIFICATION OF GOOD FAITH ATTEMPT TO COMPLY WITH COURT ORDER** (ORAL ARGUMENT REQUESTED) Supreme Court No. 20020683 Consolidated Case No. 010905355

Defendants Philip D. Gubbay, Capital Suisse, S.A. (the "Fund"), Zooley Services Limited ("Zooley"), Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland [sic] Limited ("Fernland") (all collectively "Capital Suisse") through their appellate counsel respectfully submit this Certification of Good Faith Attempt to Comply with Court Order.

INTRODUCTION

On August 15, 2002, Capital Suisse appealed the July 17, 2002 Order of the trial court granting Hentsch Henchoz & Cie's ("HH&C") Motion for Summary Judgment and Motion to Dismiss in this matter. The basis of the appeal is that the trial court erroneously failed to enforce a forum selection clause found in each of the agreements at issue in this case. On August 6, 2004, this Court issued an opinion[1] that did not reach the merits of the appeal. Instead, this Court found that Capital Suisse had not complied with the trial court's orders, stayed the appeal, and ordered that Capital Suisse comply with two conditions: First, the Court required Capital Suisse, within thirty days of the its order, to bring itself into compliance with this Court's outstanding orders. Second, the Supreme Court required Capital Suisse to post a bond in the amount of any unsatisfied portion of the judgment that has been entered against it.

The Court remanded the case to the trial court to make the following determinations:

> (1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; (2) the amount of the unsatisfied portion of the district court judgment; and (3) whether Capital Suisse has posted an adequate bond in that amount.

Opinion at 125.

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[1] *See Hentsch Henchoz & CIE v. Gubbay*, ___ P.3d ___, 2004 WL 1753372 (Utah 2004) (herein after referred to as the "Opinion").

Because Capital Suisse's appellate counsel was not its trial counsel, appellate counsel sought to determine what particular orders of the district court had not been complied with as well as to determine Capital Suisse's ability to post a bond. For either of two independent reasons, Capital Suisse has been unable to post a bond. First, Capital Suisse does not have the present financial wherewithal to come close to posting a bond of the magnitude required by the Court. Second, even if Capital Suisse had adequate financial wherewithal, its assets have been frozen by the orders of a Spanish Court.[2] Therefore, it was never possible for Capital Suisse to comply with this Court's requirements. Capital Suisse has, however, made a good faith effort to comply with the Court's requirements outlined in its opinion, and on that basis requests that this Court now reach the merits of its appeal.

CERTIFICATION

I. THE COURT'S REQUIREMENTS THAT CAPITAL SUISSE POST A BOND

One of the Court's two requirements imposed on Capital Suisse was that Capital Suisse post a bond "in the amount of any unsatisfied portion of the judgment that has been entered against it." *Id.* at ¶ 24. HH&C represented to the trial court that this amount totals $27,868,098.63. [Exh. B, HH&C's Memorandum in Opposition to Defendants' Expedited Motion Seeking Declaration

[2] Capital Suisse respectfully notes that nothing has prevented HH&C from seeking to collect on the judgment it obtained while the appeal has been pending, the reason a bond typically is posted.

Regarding Outstanding Orders and Satisfaction of Bond ("HH&C's Opposition Mem.") at p. 13][3]

On remand, Capital Suisse demonstrated to the trial court that it could not post the bond required by this Court for two separate and independent reasons. First, Capital Suisse demonstrated that it lacks the financial ability to post a bond in the amount claimed by HH&C. Second, Capital Suisse demonstrated that there exist several Precautionary Measures and Orders issued by the Spanish Marbella Court in the Spanish Case that strictly prohibit Capital Suisse from accessing any of its remaining assets. Capital Suisse argued to the trial court that the Spanish Court's Orders, which freeze all of Capital Suisse's assets, adequately safeguard Capital Suisse's assets from dissipation and thus satisfy this Court's reason for requiring the bond. *See* Opinion at ¶ 24.

While the Court's Opinion does not state the reason for the Court having imposed the particular requirement of posting a bond, Capital Suisse believes the bond was ordered for the purposes set forth in Utah Rule of Civil Procedure 62(g), which provides:

> Power of appellate court not limited. The provisions in this rule do not limit any power of an appellate court or of a judge or justice thereof to stay proceedings or to suspend, modify, restore, or grant an injunction, or extraordinary relief or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

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[3] References herein are made to the pleadings filed with the trial court because the record has not yet been updated to include page numbers to these pleadings.

Rule 62 governs the stay of proceedings to enforce a judgment and the rules governing supesedeas bonds that are required for any such stay. [Exh. C, Capital Suisse's Reply Memorandum in Support of Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond ("Capital Suisse's Reply Mem.") at p. 4]. Because this Court held in its decision that its requirement that Capital Suisse post a bond for any unsatisfied portion of the judgment was based on the Court's concern that "any continued delay will lead to the further dissipation of Capital Suisse's assets," or, in other words, to maintain the status quo, Capital Suisse determined that the bond required by the Court is a supercedeas bond. *See Diversified Holdings, L.C. v. Turner*, 63 P.3d 686, 702 (Utah 2002) ("the purpose of a supersedeas bond is to protect nonappealing parties by maintaining the status quo during the appeal and insuring that those who have obtained the judgment under review will not be prejudiced by a stay of the judgment pending final determination of the appeal").

Capital Suisse pointed out on remand to the trial court that in dealing with supersedeas bonds, courts have held that the bond may be waived if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond. *See, e.g., HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995) ("the court possesses the power to waive the requirement of a supersedeas bond"). [Exh. A, Capital Suisse's Memorandum in Support of Expeditied [sic] Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond ("Capital Suisse's Opening Mem.") at

pp. 5-6].[4] Capital Suisse directed the trial court's attention to the Tenth Circuit's decision in *Miami International Realty v. Paynter*, 807 F.2d 871 (10th Cir. 1986), in which a jury found Paynter, an attorney, liable for malpractice and awarded the plaintiff $2,100,000. Paynter appealed the decision and moved for a stay of execution of the judgment and a waiver of supersedeas bond. The trial court granted Paynter motion to stay and waived the supersedeas bond. The plaintiff then appealed the trial court's decision.

On appeal, the Tenth Circuit upheld the trial court's waiver of the supersedeas bond. In its decision, the Tenth Circuit noted that trial courts "have inherent discretionary authority in setting supersedeas bonds." *Id.* at 873. It then quoted the following from the Second Circuit's decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (1986):

> A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution. . . . " In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors. . . . A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual

[4] Capital Suisse's Opening Mem. references the Affidavit of Philip Gubbay a copy of which is attached hereto as Exh. H.

> circumstances, would not be unduly endangered. . . .

Id., citing *Wunschel & Small, Inc., v. United States*, 554 F.Supp. 444-45 (U.S.Cl.Ct.1983) (Rule 62(d) does not preclude the court from issuing a stay without a bond or upon the posting of a partial bond); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501, 520-21 (E.D.Pa.1973) (stay of execution granted following defendants' showing of lack of sufficient assets to satisfy the judgment or to obtain a bond in amount thereof and that execution of the judgment would place each of the defendants in insolvency).

The Tenth Circuit, having concluded that a stay of judgment could be obtained under Rule 62(d) without obtaining a supersedeas bond where the party appealing judgment has demonstrated that posting the bond is financially impossible, held that the trial court did not err in granting Paynter's request for stay without a supersedeas bond. The court found that Paynter's motion for a stay was supported by his affidavit in which he stated that he did not have sufficient assets to post a supersedeas bond for the amount of the judgment. *See also HCB Contractors*, 168 F.R.D. at 512 (waiving requirement of supersedeas bond upon finding party lacking assets to post bond). [Exh. A, Capital Suisse's Opening Mem. at pp. 5-7].

Capital Suisse demonstrated to the trial court that it lacks sufficient assets to post the bond required by this Court. [*Id.* at p. 7]. Capital Suisse further demonstrated that all of its attempts to obtain a bond were denied. [*Id.*]. HH&C produced no evidence disputing these facts. Capital Suisse therefore asked the trial court to find that the bond requirement was waived or satisfied because Capital

Suisse had done all it could do in regards to positing a bond. [*Id.*].

Capital Suisse also demonstrated to the trial court that even if it possessed sufficient assets to post the bond, the Orders by the Spanish Court in the Spanish Case that freeze all of Capital Suisse's assets would prevent Capital Suisse from posting a bond. [*Id.*]. The Order requires the "freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets" of Capital Suisse in all jurisdictions where Capital Suisse has assets, including Spain, Gibraltar, Amsterdam, New York and Salt Lake City. [*Id.* at pp. 7-8]. These Orders remain in effect at the present time. [*Id.* at p. 8]. Capital Suisse argued to the trial court that because the Orders entered in the Spanish Case prohibit the disposal (in any form) of any of the assets of Capital Suisse, any attempt by Capital Suisse to post the bond required by this Court would violate the Orders and, moreover, the Spanish Court Orders effectuated the purpose of this Court's Opinion requiring the posting of a bond. [*Id.*].

In support of its argument, Capital Suisse cited Utah Rule of Civil Procedure 62(i)(2), which provides "Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d)." [Exh. A, Capital Suisse's Opening Mem. at p. 8]. Capital Suisse also directed the trial court's attention to *D'Aston v. D'Aston*, 790 P.2d 590 (1990), a decision relied upon heavily by this Court in its Opinion in this case, that a party seeking a stay "merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard [its] assets from dissipation pending her

appeal." *Id.* at 594. [*Id.*]. Capital Suisse argued that the Orders entered in the Spanish Case, which freeze all of Capital Suisse's assets, provide an alternative safeguard of Capital Suisse's assets from dissipation. *See Paynter*, 807 F.2d at 874 (finding trial court's order enjoining the transfer or disposing of any assets a sufficient alternative safeguard to supersedeas bond); *see also HCB Contractors*, 168 F.R.D. at 514 (holding an order restraining the transferring of judgment debtors assets sufficient alternative security to waive supersedeas bond). [Exh. A, Capital Suisse's Opening Mem. at p. 8].

Capital Suisse noted to the trial court that the clear desired intent of this Court's requirement that Capital Suisse post a bond is to protect HH&C from any further dissipation of Capital Suisse's assets. [*Id.* at p. 9)]. It then argued that because Capital Suisse's assets are frozen pursuant to the Spanish Court's Orders, there is no threat that Capital Suisse's assets will be dissipated pending the appeal of this matter. [*Id.*]. Capital Suisse therefore asked the trial court to find that this Court's bond requirement is unnecessary as it will provide no additional protection to HH&C in this regard. [*Id.*].

In its Opposition to Capital Suisse Motion, HH&C argued that this Court's opinion clearly states that Capital Suisse must post a bond or the appeal is dismissed. [Exh. B, HH&C's Opposition Mem. at p. 9]. In other words, HH&C argued that the Court's Opinion granted the trial court no discretion to determine whether Capital Suisse was unable to post a bond or whether it had provided adequate alternative safeguards. [*Id.* at pp. 9-10].

At the hearing on Capital Suisse's Motion, the trial court agreed with HH&C's position. It found that it only

had authority on remand to determine whether Capital Suisse had or had not posted a bond. [Exh. D, Transcript of October 20, 2004 Hearing before Judge Anthony. B. Quinn ("Hearing Transcript") at pp. 3, 5 36.]. The trial court refused to look beyond that fact to Capital Suisse's arguments regarding its inability to post the bond. [*Id.*]. Finding that Capital Suisse had not posted a bond, a fact that is not disputed, the trial court concluded that Capital Suisse had not met the bond requirement in this Court's Opinion. [*Id.* at p. 36].

At the time this Court entered its Opinion requiring the bond, it had no facts before it that would allow it to know it would be impossible for Capital Suisse to post the required bond. In *In the Matter of the Discipline of Jamis M. Johnson*, 48 P.3d 881 (Utah 2002), Justice Durham argued "Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution." *Id.* at 887 (Durham, J., concurring and dissenting). Absent a finding by this Court that the bond requirement has been satisfied in light of the Spanish Court's Orders, or, at a minimum removing the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and has been, in effect, condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. Capital Suisse therefore requests that the Court hold the bond requirement is sufficiently satisfied.

II. THE COURT'S REQUIREMENTS REGARDING OUTSTANDING ORDERS OF THE TRIAL COURT

Capital Suisse's appellate counsel was not Capital Suisse's trial counsel. Without having first-hand background knowledge of the procedural posture of this case, counsel for Capital Suisse attempted to determine what outstanding orders of the trial court existed. Based on a review of the record in this case prior to appeal and conversations with Capital Suisse, counsel for Capital Suisse believed the only outstanding order from the Court that Capital Suisse had failed to comply with was the trial court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation (as specifically noted in the Court's Opinion at ¶ 24).

Capital Suisse's counsel also spoke to HH&C's counsel regarding which orders of the trial court remained outstanding.[5] HH&C's counsel responded that the documents that had been removed from Utah needed to be produced and that there may be an issue with respect to Capital Suisse's responses to interrogatory and document requests. Based on the fact that HH&C had been provided the information sought by the discovery requests and given the fact that HH&C's counsel was indefinite as to

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[5] The reason why Capital Suisse contacted HH&C's counsel was to determine exactly what discovery HH&C still considered it needed, given the fact that a default judgment had already been entered in this case. It makes absolutely no sense to Capital Suisse that it be required to produce discovery on issues that have been resolved by entry of the default judgment.

whether HH&C believed interrogatory and document requests still required further response, Capital Suisse believed that the Court's requirement as it related to Capital Suisse's compliance with the outstanding orders of the trial court would be satisfied by returning the documents removed from Utah.

Capital Suisse returned all documents and/or materials it had removed from Utah in its control and possession on September 3, 2004. [Exh. E Second Affidavit of Philip Gubbay at p. 3]. The materials thereafter were immediately made available to HH&C's counsel for review. [Exh. B, HH&C's Opposition Mem. at p. 8; Exh. F, Letter to HH&C dated September 3, 2004]. Also on September 3, 2004, Capital Suisse filed with the trial court an expedited motion seeking a declaration from the trial court that by returning the materials removed from Utah, it had complied with the court's remaining outstanding orders as required by this Court's Opinion. [Exh. A, Capital Suisse's Opening Mem.]. HH&C filed an opposition to Capital Suisse's Motion on September 20, 2004. [Exh. B, HH&C's Opposition Mem.].

In its opposition, HH&C claimed that Capital Suisse has not adequately complied with the orders of this Court because (1) Capital Suisse's production of the documents removed from Utah was insufficient and that (2) Capital Suisse has failed to respond to HH&C's interrogatories and document requests. In particular, HH&C claimed that the responses to its discovery requests were necessary to trace nearly $25 million that was allegedly fraudulently obtained by Capital Suisse. [Exh. B, HH&C's Opposition Mem. at p. 3]. HH&C alleged that its discovery requests sought the most fundamental information – i.e., "how and where the Capital Suisse Defendants had hidden and

laundered HH&C's $25 million, and where it was located." [*Id.* at pp. 5-6].

In regards to the materials returned to Utah, HH&C relied on the affidavit of a former employee of Capital Suisse, David Smith, who HH&C claims stated that the materials removed from Utah included (a) computer hard drives, (b) records of wire transfers and financial records of Zooley of Utah, and (c) emails regarding an entity named PetsMarketing. HH&C claimed that these materials were not included in Capital Suisse's production of the materials removed from Utah. [*Id.* at pp. 8-9].

In its Reply Memorandum, Capital Suisse demonstrated to the trial court that despite HH&C's claim to the contrary, Capital Suisse in fact had returned all documents in its control and possession it removed from Utah. Capital Suisse demonstrated that as a result of this case and the orders freezing all of the assets of Capital Suisse issued in *In the Matter of: The Criminal Proceeding of the Kingdom of Spain and Hentsch, Henchoz & Cie against Philip David Gubbay*, Court of First Instance and Instruction No. 2 Marbella, Court No. 1346/2000 (the "Spanish Case"), which involves the same issues and has been consolidated with this case, Capital Suisse was unable to pay its employees. [Exh. C, Capital Suisse's Reply Mem. at p. 3; Exh. E, Second Affidavit of Philip Gubbay at ¶ 10-11]. Some of the disgruntled employees, in order to retaliate against or pressure Capital Suisse to pay their wages, in turn, stole or destroyed equipment, documents, computers, and other assets of Capital Suisse, including some documents, computers, equipment and other materials that had been removed by Capital Suisse from Utah. [*Id.*, Exh. E, Second Affidavit of Philip Gubbay at ¶¶ 14-16]. In complying with the trial court's outstanding order, Capital

Suisse returned **all** of the documents it had. To the extent there are computer hard drives or other documents in its possession and/or control, Capital Suisse demonstrated that it had returned them to Utah. [Exh. C, Capital Suisse's Reply Mem. at 3, Exh. E, Second Affidavit of Philip Gubbay at ¶¶ 14-16].

Capital Suisse also demonstrated that HH&C's claim that the wire transfer records and financial records for Zooley were absent was disingenious. Capital Suisse directed the trial court's attention to the Appendix to HH&C's Memorandum of Points and Authorities in Support of Motion for Summary Judgment on the First, Second and Sixth Claims Against Capital Suisse Defendants ("HH&C's Summary Judgment Mem.") at Nos. 27 and 28, in which HH&C attached copies of the bank records and wire transfer records for Zooley of Utah. [Exh. C, Capital Suisse's Reply Mem. at p. 1]. Thus, HH&C already had in its possession the information it claimed was absent from Capital Suisse's production of the documents removed from Utah.

Finally, Capital Suisse demonstrated to the trial court that it did not possess the information on PetsMarketing that David Smith claimed in his Affidavit was sent to Spain. [Exh. E, Second Affidavit of Philip Gubbay at ¶ 16)]. While the materials Capital Suisse returned to Utah contained a few emails mentioning PetsMarketing, those emails were drafted by Douglas Hoyt in his capacity of general counsel for Capital Suisse and are protected under the attorney client privilege and thus not required to be produced. Capital Suisse prepared a privilege log containing this information that it made available to counsel for HH&C. [Exh. G, Letter to HH&C dated October 19, 2004.] HH&C made no attempt to demonstrate

why the information is relevant and Capital Suisse understands that HH&C made no attempt to subpoena any of the information regarding PetsMarketing from PetsMarketing.

In response to HH&C's argument that Capital Suisse failed to comply with the trial court's outstanding orders by failing to respond to its interrogatories and discovery request, Capital Suisse demonstrated to the trial court that HH&C already possesses the information it sought to discovery in its discovery requests. Capital Suisse again directed the trial court's attention to the Appendix to HH&C's Summary Judgment Memo. at Nos. 27 through 28, in which HH&C attached copies of the Utah bank records of Capital Suisse during the period when HH&C alleges that Capital Suisse laundered its money out of the Utah banks accounts all over the world. [Exh. C, Capital Suisse's Reply Memo. at p. 1]. Capital Suisse also noted to the trial court that also attached is a detailed flow chart prepared by HH&C that analyzes the flow of HH&C's funds for the transaction at issue. [*Id.*] In addition, Capital Suisse pointed out to the trial court that in the documents removed from Utah that Capital Suisse returned are all of the financial records for Capital Suisse's operations in Utah. [*Id.*].

Capital Suisse also drew the trial court's attention to the fact that HH&C recently represented in the Spanish Case, in opposition to a motion by Capital Suisse seeking to extend discovery in that case, that HH&C's discovery is sufficient, there is no need for further discovery, and that a trial date should be set. [*Id.* at p. 2].

Capital Suisse, on the remand of this matter to the trial court, argued that, given its representation to the

Spanish Court in a case consolidated with this one, HH&C cannot, in good faith, now claim that it does not have the discovery it has requested from Capital Suisse. [*Id.*]. HH&C already possesses that very information.

In a good faith effort to comply with this Court's Opinion, Capital Suisse also diligently endeavored to secure documents and materials in the possession and/or control of third parties prior to the hearing on its Motion. Capital Suisse was able to locate a data tape containing information from one of the computer hard drives removed from Utah that was in the possession of an attorney in California. Upon receipt of the data tape in Utah, counsel for Capital Suisse immediately made it available to HH&C for review and copying. [Exh. G, Letter to HH&C dated October 19, 2004.] HH&C declined Capital Suisse's invitation to review and copy the tape.

Capital Suisse also produced copies of its financial and accounting records that Capital Suisse ultimately had to purchase from one of its disgruntled former employees who had taken the records when he left Capital Suisse. [*Id.*] These records were also made available to HH&C for review. HH&C also declined the invitation to review these records.

In addition, Capital Suisse produced copies of its audits performed during the relevant years to this case. [*Id.*] HH&C again rejected Capital Suisse's invitation to review these audits.

After producing these documents in Utah, Capital Suisse prepared responses to Capital Suisse's Second Set

of Interrogatories and Document requests, which it served on HH&C on October 19, 2004.[6]

III. CAPITAL SUISSE DID EVERYTHING REASONABLY WITHIN ITS POWER TO COMPLY WITH THIS COURT'S OPINION

In an effort to comply with this Court's Opinion so that the merits of its appeal may be reached by this Court, Capital Suisse acted in good faith and did everything reasonably within its power. At the hearing held on Capital Suisse's Motion on October 20, 2004, the trial court found that its hands were, in effect, bound by the extremely limited instructions contained in this Court's Opinion. The trial court held that because it had determined that some discovery was produced outside the thirty-day limit set by this Court, even if Capital Suisse had now fully complied with the trial court's outstanding orders, the court was "not in a position to determine whether there has been full compliance outside the 30 days.[7] [Exh. D. Hearing Transcript at pp. 34-35]. The trial court therefore concluded that the Court's requirement

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[6] The Second Set of Interrogatories and Document Requests contains essentially identical requests to those in HH&C's First Set of Interrogatories and Document Requests in addition to numerous other requests. Because the Second Set encompassed all information sought by the First Set, Capital Suisse responded to the Second Set.

[7] Again, Capital Suisse firmly believes that the information sought by HH&C's discovery was provided to HH&C within or prior to the thirty-day period established by the Court. When HH&C thereafter complained that an issue still allegedly existed with respect to Capital Suisse's discovery responses, out of an abundance of caution, Capital Suisse prepared specific written responses and obtained additional documents from a third party.

regarding the outstanding orders had not been met by Capital Suisse. [*Id.* at p. 35].

Disregarding what Capital Suisse believes was the spirit and intent of this Court's Opinion, HH&C has, of course, argued (and will again argue) that because Capital Suisse did not strictly satisfy this Court's Opinion (and irrespective of whether Capital Suisse could comply), this Court should not reach the merits of Capital Suisse's appeal. Capital Suisse requests that this Court determine that Capital Suisse has made a good faith effort sufficient to address this Court's concerns such that the Court will reach the merits presented by Capital Suisse's appeal.

Absent this, Capital Suisse asks the Court to require the trial court to (1) determine whether a bond is necessary given that Capital Suisse has not sought a stay of execution of judgment on appeal; and (2) conduct an evidentiary hearing to determine whether the discovery produced by Capital Suisse sufficiently responds to HH&C's request for discovery seeking "how and where the Capital Suisse Defendants had hidden and laundered HH&C's $25 million, and where it was located," which HH&C admits is the only relevant discovery remaining in this case.

RESPECTFULLY SUBMITTED this 4th day of November, 2004.

HATCH, JAMES & DODGE

By: Brent O. Hatch
Brent O. Hatch
Mark H. Richards

Attorneys on Appeal for Defendants

IN THE SUPREME COURT OF THE STATE OF UTAH

Hentsch Henchoz & Cie,
Plaintiff/Appellee,

v. Case No. 20020683-SC

Philippe D. David Gubbay; Capital Suisse, S.A.; Capital Suisse Securities, Inc.; Capital Suisse, Inc.; Zooley Services Limited; Zooley of Utah, Inc.; Fernland Limited; Douglas P. Hoyt; and John Does 1-10,
Defendants/Appellants.

ORDER

(Filed Nov. 10, 2004)

This matter is before the court on its own order to show cause.

IT IS HEREBY ORDERED that Appellants Philippe D. David Gubbay, Capital Suisse, S.A., Capital Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc. and Fernland Limited show cause why this court should not dismiss their appeal for failure to comply with this court's decision in the above-captioned matter. *See Hentsch Henchoz & Cie v. Gubbay,* 2004 UT 64.

The Appellants' brief is to be filed on or before 5:00 p.m., November 24, 2004. The Appellee Hentsch Henchoz and Cie's brief is to be filed on or before 5:00 p.m., December 8, 2004. Briefs should be filed with the Clerk of the Court and should not exceed fifteen (15) pages in length.

Extensions in briefing length or time will not be permitted.

FOR THE COURT:

Nov. 10, 2004
Date

/s/ Michael J. Wilkins
Michael J. Wilkins
Justice

LAW OFFICES
HATCH, JAMES & DODGE
[Address Omitted In Printing]

November 24, 2004

VIA HAND-DELIVERY

Clerk of Court
Utah Supreme Court
450 South State
Salt Lake City, Utah 84114

Re: Hentsch Henchoz & CIE v. Gubbay, *et al.*, Case No. 20020683-SC

Dear Clerk:

We have recently received from the Court a copy of an Order to Show Cause in the above-referenced matter dated November 10, 2004. The Order requires Defendants to submit a brief demonstrating cause why the Court should not dismiss Defendants' appeal.

On November 4, 2004, Defendants filed with the Court their Certification of Good Faith Attempt to Comply with Court Order (the "Certification"). Please regard the Certification as Defendants' brief in response to the Court's Order to Show Cause. The Certification is fifteen (15) pages in length, exclusive of cover sheet and signature block, as required by the Court.

If you have any questions regarding this matter or if there are any concerns regarding the form or length of the Certification, please do not hesitate to contact me.

Sincerely yours,

/s/ Brent O. Hatch
Brent O. Hatch

c: Walter A. Romney, Esq.

IN THE UTAH SUPREME COURT

HENTSCH HENCHOZ & CIE, Plaintiff and Appellee, vs. PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10, Defendants and Appellants.	Supreme Court No. 20020683-SC

BRIEF OF APPELLEES IN OPPOSITION TO APPELLANT'S CERTIFICATION OF GOOD FAITH ATTEMPT TO COMPLY WITH COURT ORDER

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INTRODUCTION

In its Opinion in *Hentsch Henchoz & Cie v. Gubbay*, 2004 UT 64 ("Opinion"), this Court ordered Capital Suisse to satisfy two conditions: (1) post a bond in the entire amount of the outstanding judgment (approximately $27 million) within ninety days, and (ii) within thirty days, comply with the outstanding orders of the trial court. *See* Opinion, ¶ 24. This Court imposed these conditions to remedy defendants' "defiance," "disobedience," and "insubordination" of the district court and its orders. *Id.*, ¶ 18. In so ruling, this Court emphasized that

> "the processes of the appellate court are [only] available to one who recognizes his responsibility

> to obey court orders while they remain in effect," and "a litigant is not free to determine to what extent he will comply with the law."

Id, ¶ 19, quoting *Schmidt v. Schmidt,* 610 A.2d 1374, 1377 (Del. 1992).

Following argument on October 20, 2004, the district court determined that Capital Suisse failed to satisfy either of these express conditions.[1] Nonetheless, Capital Suisse submits a "Certification" to this Court that it made a "good faith" attempt to satisfy them. Its "Certification" is replete with vagaries, half-truths, and omissions, however, and its assertion of "good faith" is a sham. Capital Suisse has not attempted to satisfy this Court's express conditions, but instead to evade them and preserve the fruits of its fraud and its willful disobedience of the district court's orders.

As this Court knows too well by now, Capital Suisse stole $25 million from HH&C, laundered it through Salt Lake City bank accounts to family and friends all over the world, repeatedly refused to tell HH&C where its money was, and removed documents to Spain to prevent HH&C from finding out. To avoid this Court's express condition, Capital Suisse claims that a bond is unnecessary, because its assets have been frozen by the Spanish Criminal Court. What Capital Suisse fails to disclose, however, is that only about $600,000 has been frozen, none of it part of HH&C's $25 million. It is supremely ironic that Capital Suisse asserts that these orders of the Spanish Criminal Court prevent dissipation of HH&C's $25 million, when Capital

[1] The Order is reprinted in the Addendum ("Add.") to this Brief, at pages 1-3.

Suisse violated those orders by transferring the money out of the Gibraltar and Salt Lake City bank accounts. Nothing short of the bond ordered by this Court will prevent dissipation of HH&C's $25 million, or remedy Capital Suisse's willful disobedience of the district court.

Equally important, Capital Suisse did not comply with the outstanding orders of the district court. Within the 30-day deadline set by this Court, Capital Suisse did not return to Utah all the documents removed to Spain (in violation of the district court's March 25, 2002, order), and did not answer HH&C's interrogatories or respond to its documents requests (pursuant to the district court's November 15, 2001 and February 8, 2002 orders). The afternoon before the district court hearing to determine whether Capital Suisse had complied with this Court's express conditions, Capital Suisse purported to return additional documents that had been removed from the offices of Capital Suisse's Utah affiliates, and to respond to HH&C's interrogatories and document requests. Even this belated attempt did not comply with this Court's express conditions, because Capital Suisse still has not returned all the removed documents to Utah. It did not answer the vast majority of interrogatories, but instead simply referred HH&C to the documents returned from Spain. Those documents are now more than three years old, and do not answer HH&C's central questions – where is its money now? Capital Suisse has failed or refused to provide current information, and failed or refused to produce documents from its "worldwide headquarters" in Marbella, Spain.

Consequently, and in accordance with the explicit instructions in its Opinion, this Court should dismiss Capital Suisse's appeal without further notice. To do

otherwise would enable Capital Suisse to continue to "determine to what extent it will comply with the law," *id.*, and reward its disobedience and insubordination.

ARGUMENT

I. DESPITE THE COURT'S EXPRESS CONDITION, CAPITAL SUISSE ADMITTEDLY FAILED TO POST A BOND IN THE FULL AMOUNT OF THE JUDGMENT.

This Court noted in its Opinion that the district court entered summary judgment in the amount of $24,730,000, plus interest. *See id.*, ¶ 11. This Court stated unequivocally that Capital Suisse must post a bond for the "unsatisfied portion of the judgment" *Id.*, ¶ 24. Capital Suisse attempts to excuse its admitted failure to post the necessary bond by claiming (i) that it does not have the financial "wherewithal" to post the bond, and (ii) the bond is unnecessary because Capital Suisse's remaining assets were frozen by the Spanish Criminal Court, which "effectuated the purpose of this court's Opinion requiring the posting of a bond." Certification of Good Faith Attempt to Comply with Court Order ("Cert."), at 7.

A. A Bond is the Only Meaningful Remedy for Capital Suisse's Contempt of Court, and to Prevent Further Dissipation of HH&C's $25 million.

Throughout its Certification, Capital Suisse never informs this Court how much money has been frozen in the accounts in Spain or Gibraltar, or the source of the money. To do so would squarely undercut Capital Suisse's assertions that it lacks the "wherewithal" to post a bond,

or that the Spanish Criminal Court orders protect HH&C against dissipation of its $25 million.

Only about $540,000 remains in the Gibraltar account, and about $60,000 in the Spanish account, *See* Affidavit of Luis Juega Garcia, Add., at pages 4-6, ¶¶ 11-12. None of HH&C's $25 million remains in either account, because Capital Suisse wired it to family and friends all over the world to evade the freeze orders.

As this Court will recall, HH&C made seven wire transfers to the Gibraltar account between December 2000 and March 2001. There can be no question that Gubbay directed HH&C to wire its money to the Gibraltar account to evade the May 25, 2000, Spanish Criminal Court order freezing the account in Spain. Capital Suisse then wired HH&C's $25 million from the Gibraltar account to the Salt Lake City accounts at Wells Fargo and Zions Bank, and from those accounts to Gubbay's family and friends throughout the world. Many of the transfers occurred after the Spanish Criminal Court froze the Gibraltar account on May 15, 2001, and the Salt Lake City accounts on May 17, 2001. Indeed, this Court noted that between June 26 and July 25, the Zions account went from a balance of $2,207,006.04 to $804,468.31. *See* Opinion, ¶ 6 & n. 1. A week later, only about $150,000 remained in the Salt Lake City accounts. *See* Brief of Appellees ("Br. App."), Statement of Facts, ¶¶ 38, 43.

Specifically, and without limitation, Gubbay directed the following transfers out of the Salt Lake City accounts:

- Gubbay's father, Donald Gubbay, received $5.31 million, mostly wired to his account in Port Vila, Vanuatu, a South Pacific island known as a money laundering center and tax haven, including transfers

on May 21, June 5 (twice) June 28, and Aug. 2, 2001;

- Gubbay's wife, Veronique Gubbay, received $1.1 million, including transfers to accounts in France on May 18, June 7, and July 17, 2001;
- Gubbay's sister, Denyse Anne Pentecost, received $150,000, including $75,000.00 wired to an account in New Caledonia on June 5, 2001;
- Marianne Zenger, the insider who "introduced" Gubbay to HH&C, received more than $1 million, including $441,000 on June 6, 2001; and
- more than $7 million was wired to an account in Switzerland under the psuedonym recipient identified as "Koukouk" received more than $7 million.

See id., ¶¶ 47-48.

Because HH&C's $25 million is not subject to the Spanish Criminal Court orders, Capital Suisse's assertion that those orders protect HH&C from further dissipation, is false and utterly disingenuous. Without a bond, Gubbay and his family can dissipate it with impunity. Moreover, Gubbay has repeatedly violated the very orders that he now asserts protect HH&C. When asked in the Spanish Criminal proceeding, whether he had ordered the transfer of funds in violation of the May 17 order, Gubbay asserted his privilege against self-incrimination. *See id.* But Gubbay's Affidavit appended to Capital Suisse's Certification conclusively establishes the violations. Indeed, had Gubbay obeyed the Spanish Criminal Court orders at the time, HH&C in all probability would never have been forced to

seek relief in the Utah courts to preserve and to recover its money.[2]

Capital Suisse cites several decisions for the proposition that a court may waive a bond "if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond." Cert., at 5. Not one of these decisions is relevant. Unlike this Court, not one of these courts required a bond as a remedy for a party's "defiance," "disobedience," and "insubordination" of the district court. Further, not one of these courts did what Capital Suisse asks this Court to do – excuse it from posting any bond whatsoever. In fact, each court required alternative security in lieu of a bond. Most important, not one of those defendants did what Gubbay and Capital Suisse did here – steal the plaintiffs' money, place it beyond the jurisdiction of the court, and refuse to return it. Despite Capital Suisse's artful protestation that it lacks

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[2] Gubbay summarized the Spanish Criminal Court orders in the following terms:

> 5. On approximately July 25, 2000, the Spanish Marbella court entered a Precautionary Measure, ordering that all of my personal assets and the assets of all companies under my direction and control in Spain be frozen. This precautionary Measure became effective indefinitely on approximately January 24, 2001. The July 25, 2000 Precautionary Measure remains in effect at this time.
>
> 6. On approximately May 15, 2001, the Spanish Marbella court extended the July 25, 2000 Precautionary Measure to include the assets held by myself and the Fund in Gibraltar, Amsterdam, and New York City. . . .
>
> 7. The Spanish Marbella Court further extended the July 25, 2000 Precautionary Measure on approximately May 17, 2001, to include the Wells Fargo Bank and Zions First National Bank accounts in Salt Lake City of myself, the Fund and Zooley. . . .

Affidavit of Philip D. Gubbay, Cert., Ex. H, ¶ 5.

the "wherewithal" to post a bond, there can be no question that Gubbay and those he controls have HH&C's $25 million, or very large portions of it.[3]

By wiring HH&C's $25 million to foreign bank accounts held by family and friends, Gubbay and Capital Suisse have nullified the effectiveness of HH&C's Utah judgment. This Court's express condition that Capital Suisse post a bond for the entire amount of the judgment, is the only meaningful remedy for Capital Suisse's disobedience of the district court orders. Because Capital Suisse has failed to post the required bond, this Court should dismiss Capital Suisse's appeal without further notice.

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[3] In *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501 (E.D. Pa. 1973), the court waived a supersedeas bond to secure a $1.2 million judgment, but (i) placed in escrow all of the defendant company's stock in escrow; (ii) placed in escrow the individual defendants' shares of other securities and cash, (iii) required the individual defendants to post an [sic] cash bond of $100,000; and (iv) placed severe restrictions on the defendants ability to pay out any monies. *See* 368 F. Supp. at 520-21. In *Miami Int'l. Realty Co. v. Poynter*, 807 F.2d 871 (10th Cir. 1986), the Tenth Circuit waived a supersedeas bond to secure a $2.1 million judgment in a legal malpractice action, but placed in escrow $500,000, the limits of the firm's malpractice coverage. *See* 807 F.2d at 874. In *HCB Contractors v. Rouse & Assoc.*, 168 F.R.D. 508 (E.D. Pa. 1995), the court froze the transfer of substantial real estate assets, and permitted liens to be filed against them. See 168 F.R.D. at 514.

II. CAPITAL SUISSE FAILED TO COMPLY WITH THE ORDERS OF THE DISTRICT COURT.

A. Capital Suisse Did Not Return All Documents Removed from Utah or Respond to HH&C's Discovery Requests Within Thirty Days.

In its Opinion, this Court specifically and expressly held that

> Capital Suisse must, within thirty days from the date of this decision, [to] bring itself into compliance with the orders of the district court in this matter, including those orders requiring Capital Suisse to comply with discovery and to return all of the requested documents and evidence to Utah.

Opinion, ¶ 24. The relevant district court orders included (i) its March 25, 2002, order requiring Capital Suisse to return from Spain all documents that had been removed from the offices of Capital Suisse's Utah affiliates, and (ii) its November 15, 2001, and February 8, 2002, orders requiring Capital Suisse to Respond to HH&C's First and Second Sets of Discovery, which included interrogatories and documents requests.

The thirty days expired not later than Tuesday, September 7, 2004. By correspondence dated September 3, 2004, Capital Suisse informed HH&C (through counsel) that materials removed from the Utah subsidiaries to Spain were available for inspection. Upon inspection, HH&C found that the documents were not organized, and that many had merely been dumped into a box. No index existed. *See* Affidavit of Walter A. Romney, Jr., Add. Pages 15-20, ¶¶ 3-6.

Even without an index, however, it was clear that Capital Suisse had not returned all of the documents and materials removed to Spain.[4] Obviously missing were computer hard drives, compact and/or floppy disks, and other electronic data specifically removed and ordered to be returned. There were no records of wire transfers or financial records of Zooley of Utah. There were a few random e-mails, but not the e-mails or other documents showing (i) how and why Gubbay orchestrated the reverse merger with PetsMarketing, Inc., (ii) how Capital Suisse calculated its net asset valuation, or (iii) investments made by Capital Suisse. All of these were materials identified by David Smith as removed to Spain. *See id.*, ¶¶ 7-12.

Aside from its failure to return all documents removed from Utah within thirty days, Capital Suisse made not the slightest attempt to answer HH&C's interrogatories or to produce documents maintained by Capital Suisse at its "worldwide headquarters" in Marbella, Spain. That failure is simply inexcusable. Nonetheless, Capital Suisse asks to be excused from this failure, because it

> believed the only outstanding order from the Court that Capital Suisse had failed to comply with was the trial court's March 25, 2002 Order

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[4] All of these documents and materials were identified in the affidavit of David Smith, an officer and employee of Capital Suisse's Utah affiliates. In January 2002, Gubbay directed Smith to ship all documents and records from Capital Suisse's Utah offices to Spain. Smith refused, but two other representatives of Capital Suisse flew to Salt Lake City and shipped all documents, records, computer hard drives, and other data, to Spain. *See* Br. App., Statement of Facts, ¶ 55. Smith's Affidavit is reprinted in the Addendum to this Brief, at pages 7-14.

> requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation (as specifically noted in the Court's Opinion at ¶ 24).

Cert., at 10.

This assertion defies credulity, and strongly belies Capital Suisse's claim of "good faith." This Court specifically referenced the HH&C's interrogatories in its Opinion, when it noted that the District Court had

> ordered Capital Suisse to comply with *HH&C's outstanding discovery requests,* which it noted had been outstanding for "some time." In response, Capital Suisse invoked the Fifth Amendment privilege against self-incrimination and otherwise refused to answer. Capital Suisse's privilege claim was also denied by the district court, and the court *again ordered Capital Suisse to answer the interrogatories* and ordered all of the Capital Suisse defendants to answer the complaint.

Opinion, ¶ 9 (emphasis added). Moreover, HH&C's Brief of Appellees repeatedly referenced the outstanding discovery requests, and summarized many of the interrogatories that Capital Suisse had refused to answer. *See generally,* Br. App., Statement of Facts, ¶¶ 52-55 & n. 5. Finally, Capital Suisse admits that HH&C's counsel identified the outstanding interrogatories among the orders of the district court. *See* Cert., at 10.

There simply is no "good faith" explanation for Capital Suisse's failure to comply with the district court's orders within thirty days. Pursuant to its Opinion, therefore, this Court should dismiss Capital Suisse's appeal on the merits.

B. To This Day, Capital Suisse Has Not Complied with the Outstanding Orders of the District Court, but Has Refused to Provide the Most Fundamental Information Requested by HH&C.

Following a hearing on October 20, 2004, the district court entered its order determining that Capital Suisse had not complied with the express conditions set [sic] in this Court's Opinion. The afternoon before the hearing, Capital Suisse notified counsel for HH&C that additional documents had been returned to Utah from Spain. That same day, Capital Suisse purported to serve on HH&C its Response to Plaintiffs' Second Set of Discovery Requests ("Response"). A copy is attached to the Addendum at pages 21-48. These last-minute maneuverings, however, still do not comply with the district court's outstanding orders.

First, Capital Suisse has not returned all of the documents removed from the offices of the Salt Lake subsidiaries. Capital Suisse still has not returned documents relating to PetsMarketing, documents relating to alleged investments by Capital Suisse, still has not returned e-mails, correspondence, or memos relating to investments or investment decisions. Capital Suisse purports to have found one of the several computer hard drives removed from the offices, but has not returned the others. Indeed, Capital Suisse now claims that it is "impossible" to return all of the documents and computer information removed from the Salt Lake City offices. *See* Cert., at 12. But the "impossibility" of returning all documents and computer materials does not demonstrate "good faith." To the contrary, it demonstrates the prejudice to HH&C caused by Capital Suisse's wilful disobedience of

the district court, and the propriety of this Court's requirement that Capital Suisse return all documents.[5]

Second, Capital Suisse's Response to HH&C's Discovery Requests refuses to disclose any meaningful information. Tellingly, *Capital Suisse does not append its Response to its Certification to this Court,* because that would have displayed the bankruptcy of its purported "good faith." HH&C's interrogatories requested the most fundamental information, including:

- the current location of any and all monies received by any of the defendants from HH&C, directly or indirectly (Interrogatory No. 2); all accounts in which any of HH&C' s monies received by any of the defendants were deposited or transferred (Interrogatory No. 3);
- the current location of any and all monies received by any of the defendants from Capital Suisse Management (Interrogatory No. 4);
- all accounts in which any of Capital Suisse Management Inc.'s monies received by and of the defendants were deposited or transferred, including

[5] Capital Suisse baldly and incorrectly asserts that "HH&C made no attempt to demonstrate why the information is relevant and Capital Suisse understands that HH&C made no attempt to subpoena any of the information regarding PetsMarketing from PetsMarketing." Cert., at 13. The PetsMarketing documents are important because Capital Suisse attempted to redeem PetsMarketing shares to HH&C when HH&C demanded an accounting of its investment. HH&C issued subpoenas to PetsMarketing, after first obtaining Letters Rogatory from Judge Nehring, and to its holding company, its president, its attorney, its transfer agent, and its broker. HH&C's counsel, Walter A. Romney, Jr., and its private investigator flew to Canton, Ohio, and Orange County, California, to personally retrieve documents from PetsMarketing and its agents.

the name of the institution and the account number (Interrogatory No. 5);

- each and every purchase, sale exchange, transfer or other transaction received by any of the defendants from HH&C (Interrogatory No. 6);
- each and every purchase, sale exchange, transfer or other transaction received by any of the defendants from Capital Suisse Securities (Interrogatory No. 7);
- all investment holdings of Capital Suisse, S.A. from November 1, 2000, to date, and the value of each holding (Interrogatory No. 8); and
- all shareholders, officers, and directors or each defendant other than Douglas P. Hoyt and D. David Gubbay, and the percentage of shares held by each shareholder (Interrogatory No. 9).

Capital Suisse provides none of the information requested by these interrogatories. Instead, Capital Suisse asserts that the "information sought" in these interrogatories can be "ascertained from" from the records returned to Utah, and "pursuant to Utah Rule of Civil Procedure 33(d), Capital Suisse refers HH&C to those documents." *See* Response, Add., pages 21-48. As Capital Suisse well knows, the documents are incomplete, relate only to Capital Suisse's Utah affiliates, and are now more than three years old. Further, Capital Suisse has not produced *any* documents from its "worldwide headquarters" in Marbella, Spain

It is axiomatic that a party has a duty to "provide true, explicit, responsive, complete and candid answers to interrogatories, "*Alexander v. F.B.I.,* 192 F.R.D. 50, 52 (D.D.C. 2000), and is "obliged to respond by furnishing

such information *as is available to the party." In re Auction Houses Antitrust Litigation,* 196 F.R.D. 444, 445 (S.D.N.Y. 2000) (emphasis in original). Most important, a party must provide all information known at the time it answers the interrogatories. *See, e.g., Chubb Integrated Systems Ltd. v. National Bank,* 103 F.R.D. 52, 60 (D.D.C. 1984) (when an interrogatory "seeks facts within the knowledge of [the party] *at the time of"* the answer, the party must "disclose the information") (emphasis in original); *Shearson Lehman Hutton, Inc. v. Lambros,* 135 F.R.D. 195, 198-99 (M.D. Fla. 1990) (a party is "required to disclose what information they do possess at the time they respond").

Moreover, Capital Suisse cannot rely on Rule 33(d) to avoid its duty to provide current information. Rule 33(d) is available only if the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served. *See* U. R. Civ. P. 33(d). Capital Suisse cannot claim in good faith that the burden of identifying the "current location" of HH&C's $25 million is the same for HH&C as it is for Capital Suisse (even if that crucial information were to be found in the documents, which it is not).

Finally, Capital Suisse cannot reference the documents available for inspection, and require HH&C to sift through them in hopes of ascertaining the response. Rule 33(d)[6] does not authorize "document dumps;" a party must

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[6] *See, e.g., Starlight Int'l., Inc., v. Herlihy,* 186 F.R.D. 626, 640 (D. Kan.1999) (a party cannot meet its discovery obligations simply by referring generically to past or future production of documents, but must specifically identify which documents contain the answer; otherwise the party "must completely answer the interrogatory without referring to the documents"); *Miller v. Federal Express Corp.,* 186 F.R.D. 376, 385 (W.D. Tenn. 1999) (a "responding party must specify

(Continued on following page)

specifically identify the document(s) where the answer is found. Capital Suisse has made no attempt to direct HH&C to the documents where the interrogatory answers may be found, because, as Capital Suisse knows, the documents do not include the answers.

As a result of Capital Suisse's failure to comply with these basic principles, HH&C to this day does not know the "current location" of the more than $5 million wired to Gubbay's father in Vanuatu. HH&C still does not know the "current location" of the more than $1 million wired to Gubbay's wife in France, the $150,000 wired to Gubbay's sister, or the more than $1 million wired to insider Marianne Zenger. HH&C's efforts to trace its money, as reflected in the exhibits to its summary judgment memorandum, reached a dead end. Gubbay and Capital Suisse know where HH&C's money is, HH&C does not.

Capital Suisse's assertion that HH&C "already possesses the information it sought to discover," Cert. at 13, is especially misleading. Capital Suisse references a pleading that HH&C filed in the Spanish Criminal Court, stating that there is now sufficient evidence to require Gubbay to stand trial. Cert., at 14. The Spanish proceeding is criminal, not civil – its purpose is to try Gubbay for his crimes, not to recover HH&C's money. Because of Gubbay's privilege against self-incrimination under Spanish law, HH&C does not have the right to review Capital Suisse's documents or to trace its assets. *See* Affidavit of Luis M. Juega

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documents from which answer may be derived with sufficient detail to permit requesting party to locate [them]"); [*Capacchione v. Charlotte-Mecklenburg Schools,* 182 F.R.D. 486, 490 (W.D.N.C. 1998) (a party "abuses the option" in Rule 33(d) "when the party simply directs the [requesting] party to a mass of business records").

Garcia, Add. at pages 4-6, ¶¶ 5-7. HH&C's submission to the Spanish Criminal Court therefore has nothing to do with its long overdue need for honest answers from Capital Suisse here.

In summary, Capital Suisse has not responded to the outstanding orders of the district court in good faith. Its Response, in fact, does nothing more than continue Capital Suisse's steadfast efforts to wire HH&C's money beyond the jurisdiction of the Utah courts, and to block any recovery by HH&C. HH&C's position today is no different than it was three years ago, when Capital Suisse violated the orders of the Spanish Criminal Court freezing its accounts, and the orders of the Utah district court. To hear Capital Suisse's appeal on the merits would reward Capital Suisse for its continued intransigence, because Capital Suisse has done nothing that rectifies its earlier contempt of court.

CONCLUSION

For the reasons stated above, this Court should dismiss Capital Suisse's appeal without further notice. Capital Suisse has not satisfied either of the two conditions imposed by this Court's Opinion. Capital Suisse has not posted a bond, and has not complied with the outstanding orders of the district court.

Respectfully submitted this 8th day of December, 2004.

/s/ Perrin Love
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Supreme Court
JUN 14 2005

No. 04-1365

IN THE

Supreme Court of the United States

CAPITAL SUISSE, INC., CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, AND PHILIPPE D. DAVID GUBBAY,

Petitioners,

v.

HENTSCH HENCHOZ & CIE, DOUGLAS P. HOYT, AND JOHN DOES 1-10,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Utah

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Respondent Hentsch Henchoz & Cie ("HH&C") has failed to undermine the showing by petitioners ("Capital Suisse") that this case properly presents two important federal issues that deserve to be reviewed and decided by this Court. As shown below, HH&C's various attempts to argue that petitioners waived these issues below, or to explain away the important conflicts created by the decision below, are utterly unpersuasive. The same is true of HH&C's irrelevant and false attacks on petitioners' truthfulness and integrity.[1]

I. THIS CASE PROPERLY PRESENTS AN IMPORTANT DUE PROCESS ISSUE THAT THE COURT BELOW DECIDED ERRONEOUSLY AND IN CONFLICT WITH A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

With respect to the due process issue raised in the petition, HH&C asks this Court to deny the petition on the basis that petitioners failed to raise the argument below and because, in HH&C's judgment, the Utah Supreme Court decision was narrowly tailored to address a unique set of facts not likely to be replicated. In fact, not only did petitioners raise the due process issue below, but the Utah Supreme Court expressly addressed that question in its decision. More fundamentally, notwithstanding HH&C's efforts to transform the issue presented into a factual question, the Utah Supreme Court's holding that it may extinguish a state-granted constitutional right to appeal by imposing conditions with which compliance is impossible raises an important question of law on which the lower courts are divided, and which this Court has previously shown interest in resolving.

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[1] Respondent erroneously re-captioned the style of the case so that each defendant below is identified as a petitioner. Under this Court's Rule 12(6), however, each party below who did not join in the petition is considered a respondent and thus accorded an opportunity to respond to the petition.

A. The Utah Supreme Court Expressly Addressed the Due Process Issue Raised In The Petition.

Although Capital Suisse clearly raised the due process issue below (*see* App. 135a, Resp. App. 19b), that is irrelevant now because the Utah Supreme Court squarely resolved that issue. As this Court has repeatedly held, "[i]t is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal-law issue that the state supreme court actually considered and decided." *Cohen v. Cowles Media Co.*, 501 U.S. 663, 697 (1991) (citations omitted).

HH&C blindly claims that the due process issue was "not discussed, analyzed nor decided by the Utah Supreme Court." *See* Resp. Opp. at 11. But that is false. The Utah Supreme Court considered the due process issue and found no violation, stating that this Court "has held that dismissing the appeal of an appellant who willfully defies court orders *does not violate due process*, but rather, may be a reasonable means of safeguarding the collectibility of [a] judgment." App. 12a (emphasis added; citation and internal quotation marks omitted). That is why HH&C itself conceded in the district court, after remand, that "*[t]he Supreme Court specifically addressed due process concerns in its Opinion.*" App. 109 n.7. HH&C's revisionism cannot be reconciled with either the Utah Supreme Court's express language, or with HH&C's own district court concession.

B. The Utah Supreme Court's Decisions Conflict With the Second Circuit's Decision in *Texaco, Inc. v. Pennzoil Co.*

HH&C further argues that *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133 (2d Cir. 1986), *rev'd on other grounds*, 481 U.S. 1 (1987), does not conflict with the Utah Supreme Court's opinions because, according to HH&C, "*Pennzoil* did not address the power of the state appellate court to dismiss

an appeal of a contemptuous appellant." Resp. Opp. at 18. But HH&C's attempt to reframe the issue does not eradicate the conflict. The Second Circuit's *Pennzoil* decision clearly prohibited a State court from placing impossible conditions on a state-granted constitutional right to appeal. *Pennzoil,* 784 F.2d at 1154. In contrast, the Utah Supreme Court determined that it *could* impose unachievable threshold requirements on Capital Suisse before it could appeal, notwithstanding the fact that neither the Utah Supreme Court nor the district court had ever found Capital Suisse in contempt. Accordingly, there is an inherent conflict between *Pennzoil* and the decision below.

C. The Utah Supreme Court's Decisions Conflict With Due Process Principles Established By This Court.

HH&C also contends that the Utah Supreme Court's decisions were "[f]ully [c]onsistent" with this Court's decisions because "the Utah Supreme Court, as well as the district court, decided that Capital Suisse's 'good faith' efforts were insufficient to comply with the district court's prior discovery orders." Resp. Opp. at 22. The record emphatically belies this claim, and instead demonstrates that neither the Utah Supreme Court nor the district court ever considered whether Capital Suisse made good faith efforts to satisfy the Utah Supreme Court's discovery and bond requirements.

On remand, for example, the district court bluntly stated that its role in determining compliance was "pretty limited," and suggested instead that Capital Suisse raise with the Utah Supreme Court the issue of whether its inability to comply may excuse its partial non-compliance. App. 105a, 107a. The Utah Supreme Court, however, issued but a two-sentence opinion summarily dismissing the appeal on the sole ground that petitioners "have failed to comply with this court's decision[.]" App. 18a. Nowhere does the Utah Supreme Court even hint that it considered Capital Suisse's arguments

that its good faith efforts to comply should be deemed sufficient.

On the merits, HH&C argues that this Court's opinions demonstrate that "dismissal of an appellant's appeal does not violate due process when the appellant defies a lower court's orders." Resp. Opp. at 22 (citing *Nat'l Union of Marine Cooks and Stewards v. Arnold,* 348 U.S. 37 (1954); *Hammond Packing Co. v. Arkansas,* 212 U.S. 322 (1909); and *Nat'l Hockey League v. Metro Hockey Club, Inc.,* 427 U.S. 639, 643 (1976)). But that is an inaccurate reading of this Court's cases.

In *Hammond,* this Court upheld the trial court's striking of pleadings for failure to comply with discovery orders as consistent with due process, but took great care to emphasize that the Court had not penalized the defendant "for a failure to do that which it may not have been in its power to do." *Hammond,* 212 U.S. at 347. Elaborating further, the *Hammond* Court noted that "[a]ll the statute required was a bona fide effort to comply with an order . . . and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order." *Id.* at 347.

Similarly, in *National Hockey League*, this Court affirmed the dismissal of a complaint as a sanction for plaintiff's failure to comply with discovery orders. Resp. Opp. at 23. However, the Court qualified its holding, observing that a district court should *not* dismiss a complaint "because of petitioner's noncompliance with a pretrial production order when it has been established that failure to comply has been due to inability, and not to willfulness, bad faith or any fault of petitioner." *Nat'l Hockey League,* 427 U.S. at 640 (quoting *Societe Internationale v. Rogers,* 357 U.S. 197, 212 (1958)).

Finally, this Court similarly noted in *National Union* – a case discussed in the petition – that the appeal there "was not summarily dismissed." *Nat'l Union,* 348 U.S. at 44. Instead, the *National Union* petitioner "was allowed 15 days, after

being adjudged in contempt, within which to purge itself." *Id.*

In sum, HH&C's own authority confirms Capital Suisse's position that due process obligated the Utah Supreme Court to determine whether Capital Suisse was unable – despite good faith efforts – to comply with the court's discovery and bond requirements before dismissing its appeal. HH&C's misreading of this Court's decisions merely confirms the need for the Court to grant this petition and resolve the conflict over what it means to provide a litigant with a "fair opportunity" for a "meaningful appeal."[2]

D. The Question Presented Is Of Significant National Importance.

HH&C has likewise failed to undermine petitioners' showing that the issue presented here is one of significant national import. For example, HH&C assumes that the Second Circuit's *Pennzoil* decision is of limited significance because of its "extraordinary" facts. Yet despite these "extraordinary" facts, four Justices found the due process issue worthy of analysis in concurring opinions, and reached conflicting conclusions. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 22, 23, 28-29, 32 (1987); Pet. 14-15. The *Pennzoil* concurrences demonstrate the importance as well as the disagreements surrounding the question presented here.

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[2] HH&C oddly accuses Capital Suisse of "focus[ing] almost exclusively on the condition requiring the posting of a bond" in the courts below, Resp. Opp. 17, and "remain[ing] silent about" Capital Suisse's purported failure to comply fully with the district court's discovery orders. That is untrue. Capital Suisse repeatedly emphasized its inability to comply fully with the discovery requirements imposed by the Utah Supreme Court. *See, e.g.*, Pet. at 10 n. 2 (production of all documents impossible because some were destroyed by disgruntled employees); *id.* at 11 (same); *id.* at 17-18 n.3 (noting "good faith efforts . . . to comply with a pretrial production order"); *id.* at 19-20 (noting that Capital Suisse was "*incapable* of complying with its discovery and bond obligations").

HH&C further dismisses as "conclusory" Capital Suisse's observation that numerous state constitutions contain an unconditional right to appeal. In fact, however, Capital Suisse cited several such state constitutional provisions in their petition, and there are many others.[3] Thus, the issue presented here will plainly affect litigants in States across the country.

II. THE EQUAL PROTECTION ISSUE RAISED IN THE PETITION WAS ALSO RAISED BELOW AND IS EQUALLY WORTHY OF THIS COURT'S REVIEW.

The equal protection issue raised in the petition likewise merits this Court's review. Significantly, HH&C does not dispute that the decisions below conflict with the three state supreme court decisions cited in the petition. *See* Pet. at 20-22 (citing *Barber v. Gladden*, 298 P.2d 986 (Or. 1956); *Jack Spring, Inc. v. Little*, 280 N.E.2d 208 (Ill. 1972); *Gilbert v. State Farm Ins. Co.*, No. S-10454, 2004 WL 1701109 (Alaska July 28, 2004)). Nor does HH&C dispute that the decisions below conflict with this Court's own equal protection precedent. *See* Pet. at 22-23 (citing *Lindsey v. Normet*, 405 U.S. 56, 77 (1972); *Griffin v. Illinois*, 351 U.S. 12 (1956)).

In fact, HH&C does not address Capital Suisse's equal protection argument at all, except to say that Capital Suisse did not raise it below. Resp. Opp. At 16. But HH&C is wrong. While perhaps not invoking the magic words that HH&C demands, Capital Suisse did raise the equal protection

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[3] In addition to Utah, large states such as Illinois, Pennsylvania, Texas and Florida grant their citizens a constitutional right to appeal civil judgments, as do a number of other states, including Nebraska, Kentucky, Louisiana and New Mexico. *See* Ill. Const. art. VI, § 6; Pa. Const. art. V, § 9; *Pennzoil*, 784 F.2d at 1154 ("The Texas constitution grants a right of appeal to all civil and criminal litigants."); Neb. Const. art. I, § 23; Fl. Const. art. V, § 4; Ky. Const. § 115; La. Const. art. 5, § 10; N.M. Const. art. 6, § 2.

argument below, and the Utah Supreme Court, while not perfectly clear, appears to have addressed the argument.

In Capital Suisse's Certification of Good Faith Attempt to Comply with Court Order to the Utah Supreme Court, Capital Suisse explained that a party may be excused from a supersedeas bond requirement when it is "financially impossible for it to post the bond," and then cited as support for that proposition the equal-protection decision of an intermediate Utah appellate court in *D'Aston v. D'Aston*, 790 P.2d 590 (Utah Ct. App. 1990). Resp. App. 14b. The *D'Aston* Court, citing this Court's decision in *National Union*, addressed the constitutionality under the equal protection clause of dismissing an appeal where a party had failed to comply with a bond requirement. *D'Aston*, 790 P.2d at 594.

Thus, while Capital Suisse could perhaps have been more explicit, the propriety of imposing bond requirements upon those who lacked the requisite resources and were unable to comply was in fact before the Utah Supreme Court. *See* App. 131a-135a; Resp. App. 12b-19b. And denying access to courts based upon a party's financial status raises an obvious equal protection issue (beyond the obvious due process issue) that would be apparent to any experienced judge. *See, e.g.*, *Griffin*, 351 U.S. 12 (declaring unconstitutional state rule requiring criminal defendants to pay for transcripts prior to appellate review because it "cut off appeal rights for indigents while leaving avenues of appeal open for other defendants"); *Mayer v. Chicago*, 404 U.S. 189 (1971) (noting "flat prohibition" against "making access to appellate processes from even [the State's] most inferior courts depend upon the [convicted] defendant's ability to pay).

In its opposition, HH&C nevertheless cites *Taylor v. Illinois*, 484 U.S. 400, 406 n.9 (1988), for the proposition that a "generic reference" to Fourteenth Amendment claims is "insufficient to preserve a constitutional claim." Resp. Opp. at 14 (internal quotes omitted). HH&C fails to note, however,

that this Court held that the petitioner there *had* preserved his Sixth Amendment claim in much the same way that petitioners preserved their equal protection claim here: Although the petitioner had not expressly stated his reliance on the Sixth Amendment, he "cited and relied upon, through a quotation from an Illinois Appellate court decision, two of our Compulsory Process Clause cases[.]" *Id.* Accordingly, this Court went on to say, "the authority cited by petitioner, and the manner in which the fundamental right at issue has been described and understood by the Illinois courts, make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction." *Id.* So too here.[4]

Moreover, as noted earlier, this Court does not even need to assess and evaluate the sufficiency of the arguments made below when the state court itself appears to have addressed the constitutional issue. Here, the Utah Supreme Court, quoting *National Union*, specifically acknowledged that "a statutory review is important and must be exercised *without discrimination* . . . ." App. 12a (emphasis added). And in discussing its authority to limit a plaintiff's substantive right to appeal under article VIII, section 5 of the Utah Constitution, the Utah Supreme Court relied heavily on *D'Aston*, which as noted above explicitly addressed federal equal protection requirements. *See* App. 6a-9a; *see also D'Aston*, 790 P.2d at 594.

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[4] *See also Illinois v. Gates*, 462 U.S. 213, 247 (1983) ("no particular form of words or phrases is essential" to preserve argument); *Crowell v. Randell*, 35 U.S. 368, 392 (1836) ("[I]t is not indispensable that [the issue] should appear on the record, in totidem verbis, or by direct and positive statement"); *Braniff Airways v. Nebraska State Bd. of Equalization & Assessment*, 347 U.S. 590, 598 (1954) (Court accepted issue for review, "[t]hough inexplicit" below).

III. HH&C'S ATTACKS ON PETITIONERS' INTEGRITY ARE FALSE AND UNFOUNDED.

Finally, HH&C has made a number of misstatements about matters that have no bearing on the issues presented here, in an apparent effort to damage petitioners' credibility. That effort is doubly ironic in light of the fact that it was HH&C's own refusal to respect the clear forum selection clause in its contract with Capital Suisse that led to its prosecution of the underlying Utah state-court action.[5]

1. HH&C accuses petitioners of incorrectly stating that Capital Suisse offered HH&C "valuable stock in a related company," when in fact the stock lacked value. Resp. Opp. at 4. But the referenced company, Petsmarketing, did have value. If this issue had any bearing on the questions presented (which it does not), this Court could take judicial notice that its stock was trading at $9.25/share in June, 2001.[6] *See* www.pinksheets.com (subscription service that provides historical quotes) (relevant stock quotes attached as App. 111a-112a). The district court's contrary finding reflects only the unfortunate consequences of Capital Suisse's decision "not to participate in the district court litigation in a manner that might constitute a waiver of its right to contest the court's orders" on either jurisdictional or venue grounds. Pet. at 7.

2. HH&C also contends that Capital Suisse moved records to Spain "to evade production" and further takes issue with Capital Suisse's representation that it did so with "full

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[5] As explained in the petition, HH&C plainly agreed "that any legal action the Funds may be the object of, be brought before the court of the British Virgin Islands, and ***we renounce to take any possible legal proceedings against the Funds under other jurisdictions***." (App. 19a-21a) (emphasis added).

[6] *See La Grasta v. First Union Sec.*, 358 F.3d 840, 842 (11th Cir. 2004) (stock quotes properly the subject of judicial notice); *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 655 n. 4 (4th Cir. 2004); *Ieradi v. Mylan Lab. Inc.*, 230 F.3d 594, 600 n. 3 (3d Cir. 2000).

disclosure to the court and plaintiffs." Resp. Opp. at 5. Again, HH&C's assertions have no bearing on the questions presented and are, in any event, inaccurate.

The production issue surfaced after HH&C declined to travel to Spain to review relevant documents. At that time, Capital Suisse informed the court that a large number of responsive documents "have always been located in Spain" and that other relevant documents were transferred to Spain because "the Capital Suisse Defendants have been forced to consolidate a substantial portion of their operations." App. 116a-117a. Capital Suisse subsequently informed all concerned that, as a result of a court order freezing its assets, it had suffered financial difficulties and had closed its Utah offices. *Id.* at 32a. Although the Utah district court subsequently made the adverse finding quoted in the petition (at 8, quoting Pet. App. 48a), it did so, again, without the benefit of a substantive response from Capital Suisse, which by that time had withdrawn from the litigation at the trial court level.[7]

In all events, the questions presented in the petition plainly assume (without conceding) the correctness of the factual findings made by the courts below. Thus, any dispute over those findings is irrelevant to this Court's decision whether to grant the petition and resolve the important issues presented here.

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[7] That the document production orders are at issue at all is surprising because, according to HH&C's filings in the Spanish Court, it already knows where "its" money went and thus desires no further discovery. *See* Resp. App. 23b-24b.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDICES

APPENDIX N

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IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILIPPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

In the Matter of:

The Criminal Proceeding of the Kingdom of Spain and Hentsch Henchoz & Cie against:

Philip David Gubbay

Court of First Instance and Instruction No. 2 Marbella
Court No. 1346/2000

contempt would be to pay the judgments, and the Court order requiring him to be deposed in connection with appellee's efforts to collect on the judgments, the Court of Appeals could "elect" to dismiss the appeal until appellant submitted proof that he has satisfied the judgments. *Id.*, 993 P.2d at 251. Similarly, Capital Suisse's inability to post a bond to remedy its contempt would justify dismissal of the appeal, not waiver of the bond. In effect, the Utah Supreme Court has made that "election" in its August 6th Opinion.[7]

For these reasons, this Court should determine that Capital Suisse has not posted a bond as required by the Supreme Court's August 6 Opinion.

III. The Outstanding Judgment Amount, Jointly and Severally, Against the Capital Suisse Defendants is $27,868,098.63 Plus Post Judgment Interest.

The Utah Supreme Court also requested that this Court identify "the amount of the unsatisfied portion of the district court judgment." Opinion, ¶ 25. The Capital Suisse Defendants have made no effort nor made any payment to reduce the amount of the judgment. Therefore, this Court should

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[7] The Capital Suisse Defendant's attempt to equate its unwillingness or inability to post a bond to a "death penalty" is wholly inappropriate and without merit. The Supreme Court specifically addressed due process concerns in its Opinion. See Opinion, ¶ 23. Indeed, the death penalty for Capital Suisse is that it committed fraud when it stole, hid and laundered HH&C's $25 million and by continuing the fraud by refusing to provide any reasonable explanation to the money's whereabouts.

determine that the unsatisfied portion of the judgment remains $27,868,098 plus post judgment interest.

CONCLUSION

For all of the foregoing reasons, this Court should deny the Capital Suisse Defendants' Expedited Motion Seeking Declaration Regarding Outstanding Orders and Satisfaction of Bond. Furthermore, this Court should enter an Order pursuant to the express instructions of the Utah Supreme Court indicating that (1) the Capital Suisse Defendants have not adequately complied with Judge Nehring's orders of this Court within thirty days from the Utah Supreme Court's Opinion; (2) that the Capital Suisse Defendants have failed to post bond in the amount of the unsatisfied portion of this Court's judgment; and (3) that the amount of the unsatisfied portion of this Court's judgment is $27,868,098.63 plus post judgment interest, jointly and severally against each of the Capital Suisse Defendants.

A proposed Order is filed contemporaneously herewith for the Court's consideration.

DATED this 20th day of September 2004.

CLYDE SNOW SESSIONS & SWENSON

/s/ Neil A. Kaplan
NEIL A. KAPLAN
PERRIN R. LOVE
WALTER A. ROMNEY, JR.

Attorneys for Plaintiff Hentsch Henchoz & Cie

APPENDIX O

JUNE 10, 2005

A REPORT

TRADING INFORMATION AS REPORTED BY THE NATIONAL ASSOCIATION OF SECURITIES DEALERS COMPOSITE FEED OR OTHER QUALIFIED INTER-DEALER QUOTATION MEDIUM. THE PRIMARY STOCK MARKET LISTING IS NOTED.

ISSUE: PETSMARKETING, INC. (DELA.) COMMON

NON-NASDAQ OTC:

2001	CLOSING BID	CLOSING ASK
JUNE 5	8.50	9.25
JUNE 6	8.50	9.25
JUNE 7	8.50	9.25

2001	HIGH SALE	LOW SALE	CLOSING SALE
JUNE 5	9.25	9.25	9.25
JUNE 6	(No Sales)		
JUNE 7	9.25	8.50	9.25

NOTE: THE INFORMATION IS COMPILED WITH CARE FROM SOURCES BELIEVED TO BE RELIABLE BUT WE CANNOT GUARANTEE THE ACCURACY NOR WARRANTEE ITS USE FOR ANY PURPOSE.

NOTE: PRICES HAVE NOT BEEN ADJUSTED FOR STOCK DIVIDENDS OR SPLITS.

NOTE: THE ABOVE BID AND ASK QUOTATIONS REPRESENT PRICES BETWEEN DEALERS AND DO NOT INCLUDE RETAIL MARKUP, MARKDOWN OR COMMISSION. THEY DO NOT REPRESENT ACTUAL TRANSACTIONS.

PINK SHEETS LLC

/s/ Evelyn Walsh
EVELYN WALSH

RESEARCH LIBRARY DEPARTMENT

EW/jl

APPENDIX P

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IN THE THIRD JUDICIAL DISTRICT COURT OF
SALT LAKE COUNTY
STATE OF UTAH

Civil No. 010905355
Judge Ronald E. Nehring

HENTSCH HENCHOZ & CIE,

Plaintiff,

vs.

PHILLIPE D. DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

OPPOSITION TO REQUEST TO VACATE THE PROTECTIVE ORDER AND MOTION TO SHORTEN TIME WITHIN WHICH CAPITAL SUISSE DEFENDANTS MUST PROVIDE DISCOVERY

Defendants Phillipe D. David Gubbay, Capital Suisse, S.A., Captial Suisse, Inc., Zooley Services Limited, Zooley of Utah, Inc., and Fernland Limited (collectively, the "Capital Suisse Defendants") hereby file this Opposition to Motion to Shorten Time Within Which The Capital Suisse Defendants Must Provide Discovery and Vacate the Protective Order Regarding Bank Documents.

ARGUMENT

I. *The Bank's Request for Further Erosion of the Protective Order Is Improper and Is Not Intended to Further the Proceedings in This Or Any Other Case.*

As discussed below, the Court should deny Plaintiff Hentsch Henchoz & Cie's ("HH&C") request to further erode the protective order. Not only has HH&C failed to provide any legal or other basis for its request, but also the request is not designed to advance these or any other proceedings.

On February 8, 2002, this Court modified the protective order in this case to allow HH&C to use documents obtained in this proceeding in the proceedings currently pending in Spain and the British Virgin Islands (the "BVI"). HH&C claimed the other courts were being misled and it needed to immediately notify them about the documents. Despite the passage of five weeks since the Court's order, HH&C has yet to file any pleadings in either the Spanish or British Virgin Islands proceedings concerning the documents. The bank's claim of an immediate and pressing need to provide these documents to other Courts was, therefore, less than sincere.

Moreover, HH&C's claim that the other courts do not have the full information about HH&C's allegations is simply

untrue. The reality is that the foreign courts have all of HH&C's allegations of fraud before them. Indeed, HH&C fails to disclose to this Court that its attorneys filed a nine-page affidavit in the British Virgin Island court specifically outlining all of the bank's allegations as well as the reasoning of this Court's decision to retain jurisdiction of the matter in connection with its Motion to Dismiss the proceedings in the BVI. A copy of Mr. Neil Kaplan's affidavit dated December 10, 2001, is attached hereto. Thus, contrary to the bank's assertions, neither the BVI court nor the Spanish court has been misled.[1] Instead, HH&C is merely attempting to create a perception that the foreign courts are being misled in order to obtain favorable rulings in this proceeding.

Consistent with HH&C's plan, it now requests that the Court lift the protective order for purposes of showing the documents in this case to other unidentified "courts and regulatory authorities so that all of the records in other jurisdictions can be obtained." HH&C fails to disclose to the Court or to the Capital Suisse Defendants what other courts and regulatory authorities it has in mind. Moreover, the bank does not explain how showing these records to other regulatory authorities will help the bank obtain "records in other jurisdictions." HH&C's motion is not aimed at furthering the claims against the defendants in this case or any other case. Rather, HH&C wants to use the information to harass and intimidate business contacts and associates of the Capital Suisse Defendants and to increase the costs of litigation as part of its war of attrition against the Capital Suisse Defendants. The Court has already modified the protective order twice and has allowed HH&C to use the

[1] This Court has noted on more than one occasion that its decision to keep jurisdiction of this case was a very "close call." Therefore, the fact that the BVI court similarly determined that the proceeding against HH&C could proceed in the BVI is not surprising, nor is it a result of misleading the court as HH&C suggests.

information it has in this proceeding and in the Spanish and BVI proceedings. Here, however, HH&C has not provided this Court with any legal basis for lifting the protective order for its unknown purposes. HH&C's request should therefore be denied.

II. *HH&C Has Failed to Provide This Court With a Legal Basis for Its Request for Production of Documents in the United States.*

In a supplemental motion, HH&C requests that the Court require the Capital Suisse Defendants to produce documents in Utah. This motion should also be denied. It is well settled that in responding to discovery requests under Rule 34, all that is required is that the party make such documents available for inspection and copying. *Charles Alan Wright Arthur R. Miller*, 8A Federal Practice and Procedure § 2213 (2d ed. 1994). The operations of the Capital Suisse Defendants are located in Spain. Most of the documents responsive to HH&C's discovery requests have always been located in Spain. In fact, since the commencement of this action, the Capital Suisse Defendants have been forced to consolidate a substantial portion of their operations. As a result, and for other reasons, the remaining documents relating to the Capital Suisse Defendants are now also located in Spain. Moreover, the Capital Suisse Defendants have not and do not intend to destroy any documents, as HH&C implicitly suggests, nor is there any evidence to suggest that any documents have been destroyed. HH&C's suggestions to the contrary are simply another attempt to color the Court's opinion about the Capital Suisse Defendants in an effort to gain an improper advantage in this litigation.

Given the location of the documents, it would be improper and unduly burdensome to force the Capital Suisse Defendants to respond to the discovery requests any earlier than the deadline already imposed by the Court. For the same reasons,

require them to produce the documents in Utah would also be unjust. HH&C's motion should be rejected in its entirety.

CONCLUSION

For all of the foregoing reasons, the Capital Suisse Defendants respectfully ask the Court to deny HH&C's request to vacate the protective order as well as its motion to shorten the time for discovery.

DATED this 14th day of March, 2002.

HOLME ROBERTS & OWEN LLP

/s/ Paul T. Moxley
PAUL T. MOXLEY
MATTHEW N. EVANS
CHRISTINE T. GREENWOOD

Attorneys for the Capital Suisse Defendants

APPENDIX Q

EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(VIRGIN ISLANDS)

BVIHCV 2001/0077 [Logo]
BETWEEN:

CAPITAL SUISSE S.A.,
Claimant/Respondent,

and

HENTSCH HENCHOZ & CIE,
Defendant/Applicant.

AFFIDAVIT

I, Neil Kaplan, Attorney at law, of One Utah Center, Thirteenth Floor, 201 South Main Street,. Salt Lake City, Utah in the United States of America make oath and say as follows:

1. I am an Attorney at Law and member of the Bar of the State of Utah in the United States of America for the past 18 years and am the litigation counsel for Hentsch, Henchoz & Cie, the Applicant, in Salt Lake City, Utah, United States. I am duly authorized to make this affidavit on behalf of the Applicant in support of its application filed on December 10, 2001 herein. A copy of my biographical summary is now produced to me and marked "NAK 1".

2. The statements made herein are true and correct and unless otherwise stated within my own knowledge. The statements that are not within my knowledge I believe them to be true and correct.

3. The Applicant is a Swiss private banking limited partnership with its principal place of business situated in

Lausanne, Switzerland and has no presence in the Virgin Islands. The Respondent is a company incorporated under the laws of the Virgin Islands and has no presence in the Virgin Islands save a registered agent.

4. On August 2, 2001, the Applicant filed in state court in Salt Lake City, Utah, a Verified Complaint against Capital Suisse, S.A., (the "Respondent') which is the Claimant in this British Virgin Islands ("BVI") action and Respondent to this application and other related defendants. The other related Defendants to that action are Philippe David Gubbay who is the only person authorized to sign documents on behalf of the Respondent; Capital Suisse Inc., a Utah corporation that purports to be the administrator and registrar for the Respondent; Capital Suisse Securities Inc., a Colorado corporation that is the principal custodian of Capital Suisse S.A.; Zooley Services Limited, A Nevis, West Indies corporation that purports to be the investment advisor for the Respondent; Zooley of Utah, Inc. a Utah corporation that purports to provide financial services for Zooley Services Limited; Fernland Limited, a Nevis corporation which purports to act as director of the Respondent; and Douglas P. Hoyt, a Utah resident who holds himself out as a director and officer of Capital Suisse, Inc. A true and correct copy of the Verified Complaint is now produced to me and marked "NAK 2".

5. The Verified Complaint shows inter alia that the Respondent and the other defendants defrauded the Applicant of nearly $25 million of its monies by creating the illusion that they own, operate, administer, manage and control a legitimate and highly profitable "mutual fund" for the professional investor, i.e., Capital Suisse S.A., when in fact, they do not. The complaint further shows that the so-called "mutual fund" was merely a ruse to defraud the Applicant and others and that the

Respondent never invested the Applicant's money in legitimate investment opportunities but instead converted its funds for the Respondent's own benefit and transferred them to the Respondent's bank accounts in Salt Lake City, Utah and subsequently, to other locations.

6. The Verified Complaint states a claim for relief for fraud (among other things) and seeks a variety of remedies including rescission of the Subscription Agreements and restitution of the assets that the Applicant transferred to the Respondent. If the Utah court rules for the Applicant on its fraud claim and orders restitution, then the Subscription Agreement and related documents, inclusive of the clause under which the redemption fee is claimed in this action, would be unenforceable as between the Applicant and the Respondent.

7 On August 15, 2001, the Respondent and certain other defendants moved the Courts in Utah to dismiss the Verified Complaint on the grounds of (1) improper venue, (2) forum non conveniens, (3) international comity, and (4) lack of personal jurisdiction over certain the individual defendants including the Respondent. The Respondent argued, inter alia that the Utah court should dismiss the action in Utah and that the BVI was the preferred jurisdiction on the ground that the Subscription Agreements and related documents contained a forum selection clause choosing the BVI as the forum for the litigation of certain disputes and that based upon considerations of convenience and efficiency, the Applicant's case was not sufficiently connected to Utah to support the Utah court's continued exercise of jurisdiction.

8. Also on August 15, 2001, the Respondent filed this action in the BVI.

9. On August 29, 2001, the Applicant filed an Opposition to the Respondent's motion to dismiss. The Applicant argued that because the Subscription Agreements between it and the Respondent were merely a tool of the latter's fraud, the Utah court should not dismiss in favor of the BVI based on the forum selection clause contained therein. With regard to the Respondent's forum non conveniens argument, the Applicant argued that the Utah forum was convenient, efficient and proper because (1) Capital Suisse S.A. had consented to service and jurisdiction in Utah, (2) three of the other named defendants were located in Utah, (3) the Applicant's money was laundered through Defendants' Utah bank accounts and some still remains in Utah, (4) key witnesses, including Petsmarketing Inc. (which is referred to in the Statement of Claim filed by the Respondent in the BVI proceedings) have offices in Utah, (5) the sale of the Capital Suisse S.A. shares at issue occurred through the acts of the Utah Defendants, and (6) important documents in relation to the issues to be decided in the courts concerning the fraud are likely located in Utah.

10. The Applicant also argued that the Respondent should not be permitted to contest the jurisdiction of the courts of Utah. I am advised by Luis Juega, Spanish counsel for the Applicant and verily believe that counsel for the Respondent had submitted in proceedings before a Spanish court that the dispute between the Applicant and the Respondent was centered in Utah.

11. On September 4, 2001, the Respondent filed a Reply in support of its motion. The reply informed the Utah Court that the Respondent had filed this action in the BVI. On September 5, 2001, the Utah court (Nehring. J.) heard argument on the Motion.

12. On October 11, 2001, the Utah court denied the Respondent's motion. A true and correct copy of the Utah court's October 11, 2001 Minute Entry is now produced to me and marked "NAK 3". The court held that it would exercise jurisdiction over the Applicant's claims and proceed with adjudication on the merits, stating: *"Claimant's Verified Complaint and the record developed in connection with the defendants' Motion satisfies me that Claimant is entitled to proceed on its claim that it was fraudulently induced by Capital Suisse, S.A., to make the $25 million investment."* (*See* Minute Entry at Page 6).

13. With regard to the forum selection clause, the court held that *"I find that Claimant has alleged sufficient facts to overcome the presumption [that] the choice of forum clause in the Subscription Agreement is enforceable by making prima facie showings that the choice of forum clause is unfair and that the contract as a whole is the product of fraud."* (*Id.* at p. 4).

14. Denying the forum non conveniens argument, the Utah court found that *"much of the evidence concerning the financial affairs of Capital Suisse and its related entities, three of which are located in Utah is likely to be easily accessible in or from this forum. It is probable that part or all of the $25 million at issue found its way to Utah at one time or another. . . . I decline to send [the Applicant] elsewhere."* (*Id.* at 7).

15. On October 31, 2001, the Respondent and other defendants petitioned the Utah Supreme Court for leave to appeal the Order contained in the Minute Entry. The Utah Supreme Court has not yet ruled on their Petition. The Respondent and other defendants also moved the Utah trial court to stay the merits of the Applicant's action in Utah pending the decision from the Utah Supreme Court on whether to hear their appeal. On

November 15, 2001, the trial court denied that motion and ruled that it would proceed with adjudication of the merits. A copy of this order is now produced to me and marked "NAK 4". The Respondent has also applied to the Utah Supreme Court for a stay of all matters in the trial court pending appeal. The Supreme court has not yet ruled on the Respondent's motion.

16. The Utah trial court has therefore accepted the Applicant's arguments mentioned above. Utah is the appropriate forum for the trial of civil issues between the Applicant and the Respondent and other parties to that proceeding. Furthermore all issues relevant to the claim in the BVI and all the parties that were involved in the transactions between the Applicant and the Respondent that gave rise to the claims made in the BVI are already before the courts of Utah.

17. The Respondent and the other defendants in the Utah proceedings have not yet filed their Answer in the Utah action, which is now overdue. When the Respondent does file its answer, it will have the right to assert counterclaims against the Applicant, including the relief claimed in the proceedings in the BVI. Further, certain counterclaims are deemed "compulsory" and must be asserted by the Respondent in its answer or such claims will be waived. The claims that the Respondent has asserted in its action in the BVI will all be deemed compulsory counterclaims that it must assert or lose. The Utah Rules of Civil Procedure P 13 explain:

> *Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence*

of third parties of whom the court cannot acquire jurisdiction.

The relevant extract from those rules is now produced to me and marked " NAK 5".

18. The Respondent's claims in the BVI and the Applicant's claims in Utah both arise out of the same transaction or occurrence, *i.e.*, the Respondent's fraud against the Applicant through the medium of the subscription agreement and otherwise and failure properly to return its assets. Consequently, the Respondent must assert in its answer in Utah the claims it now asserts in the Virgin Islands or those claims will be lost.

19. If the Respondent were to assert as a counterclaim the same claim it has made in the BVI, the Utah court will have jurisdiction to resolve it. If, under Utah choice of law principles, the resolution of the counterclaim requires the application of the law of the BVI, the Utah court may apply that law. If the counterclaim is resolved in favor of the Respondent, the Utah court may award the relief that the Respondent seeks in the BVI (*i.e.*, a declaration that Capital Suisse S.A. has complied with the International Business Companies Act, Cap. 291, a declaration that the Applicant is in breach of the Articles of Association and the Prospectus by not accepting a payment *in specie* for the redemption of its shares in the Capital Suisse S.A., a declaration that the Applicant is no longer a shareholder of Capital Suisse S.A., a redemption fee of $963,919.74, damages and such further relief as the court deems just). The Applicant would, however, assert defenses against the counterclaim and any relief requested thereupon.

20. Now that the Utah court has accepted jurisdiction over the Applicant's, complaint, the Utah court has ordered that the parties shall be permitted to take discovery. If

the Defendants do not engage in dilatory tactics, discovery could be completed within the next six months. We would urge the Utah court to schedule the trial within one year.

21. At the trial of the action in Utah the parties will be entitled to introduce oral and documentary evidence, including evidence of the laws of the BVI, if appropriate, in support of their claims. Under the laws of Utah, Mr. Gubbay and any other persons have the right to be present in court at that hearing and give relevant evidence in court at the hearing on behalf of the Respondent and other Defendants. We are yet to identify any witnesses who resides in the BVI and who are expected to have relevant evidence in this matter. The procedural rules of Utah will allow the parties to introduce in evidence certified copies of public documents emanating from the Virgin Islands. I have been advised by Daniel Morales, a member of the Swiss bar, and verily believe that the enforcement of final judgment made in Utah in favor of the Respondent for compensatory damages will be enforceable against the Applicant in Switzerland under Swiss rules that would be equally applicable to such a final judgment from the court in the BVI.

22. In the circumstances the proceedings in the BVI are unnecessarily duplicative of those in Utah and would cause the litigants to incur significant additional expense without conferring any additional benefit to the parties that is not available in the proceedings in Utah. If the Utah court were to make a finding that the subscription agreement and related documents are unenforceable there would also be a waste of the resources that the courts in the BVI have allocated to these proceedings.

23. I therefore humbly request that this Honorable Court do discharge the order made granting leave to serve the

claim form, statement of claim and other proceedings in this matter on the Applicant and set aside the service of the claim form, statement of claim and other proceedings and strike out the Respondent's claim in the Virgin Islands.

SWORN at _____

On the 10th day of December, 2000

Before me:

_____

Notary public

/s/ Neil Kaplan
NEIL KAPLAN

APPENDIX R

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IN THE DISTRICT COURT FOR THE THIRD JUDICIAL DISTRICT IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Consolidated Case No. 010905355
Judge Anthony Quinn

HENTSCH HENCHOZ & CIE.

Plaintiff;

vs.

PHILIPPE DAVID GUBBAY, CAPITAL SUISSE, S.A., CAPITAL SUISSE SECURITIES, INC., CAPITAL SUISSE, INC., ZOOLEY SERVICES LIMITED, ZOOLEY OF UTAH, INC., FERNLAND LIMITED, DOUGLAS P. HOYT, and JOHN DOES 1-10,

Defendants.

MEMORANDUM SEEKING DECLARATION REGARDING OUTSTANDING ORDERS AND SATISFACTION OF BOND

Defendants Philip D. Gubbay, Capital Suisse, S.A. (the "Fund"), Zooley Services Limited ("Zooley"), Capital Suisse, Inc., Zooley of Utah, Inc., and Ferland Limited ("Fernland") (all collectively "Capital Suisse") through their appellate counsel respectfully submit this Memorandum in Support of Expedited Motion Seeking Declaration Regarding Outstanding Orders and Waiver of Bond.

INTRODUCTION

On August 15, 2002, Capital Suisse appealed the July 17, 2002 Order of this Court granting Hentsch Henchoz & Cie's ("HH&C") Motion for Summary Judgment and Motion to Dismiss. The basis of the appeal is that the Court erroneously failed to enforce a forum selection clause found in the agreements at issue in this case. On August 6, 2004, the Utah Supreme Court issued an opinion[1] staying the appeal in order to allow Capital Suisse time to comply with two conditions: First, the Supreme Court required Capital Suisse, within thirty days of the its order, to bring itself into compliance with this Court's outstanding orders. Second, the Supreme Court required Capital Suisse to post a bond in the amount of any unsatisfied portion of the judgment that has been entered against it.

The Supreme Court remanded the case to this Court to make the following determinations:

> (1) whether Capital Suisse has adequately complied with the orders of the district court within thirty days from the issuance of this decision; (2) the amount of the unsatisfied portion of the district court judgment; and (3) whether Capital Suisse has posted an adequate bond in that amount.

Opinion at ¶ 25.

Capital Suisse brings the present Motion seeking a declaration from the Court that it has complied, with all outstanding orders of this Court and has satisfied the requirement that Capital Suisse post a bond. In regards to the issue of whether Capital Suisse has adequately complied with this Court's orders, while Capital Suisse's current counsel was not Capital Suisse's trial counsel, counsel for Capital

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[1] *See Hentsch Henchoz & CIE v. Gubbay*, ___ P.3d ___, 2004 WL 1753372 (Utah 2004) (herein after referred to as the "Opinion").

Suisse understands that the only outstanding order from the Court that Capital Suisse has failed to comply with is the Court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation. Capital Suisse has returned those documents to Utah and have made the documents available to HH&C for review.

Capital Suisse also seeks to have this Court find that, for the reasons set forth herein, Capital Suisse cannot post a bond and that such requirement is satisfied by adequate alternative safeguards. As established by the Affidavit of Philip D. Gubbay ("Gubbay Aff.") filed concurrently herewith, Capital Suisse lacks the financial ability to post a bond. Moreover, there exist several Precautionary Measures and Orders issued by the Spanish Marbella Court in a matter to which HH&C is a party that strictly prohibit Capital Suisse from accessing any of its remaining assets. Therefore, any attempt by Capital Suisse to use assets to post a bond would violate the Spanish Court's Orders. The Spanish Court's Orders, which freeze all of Capital Suisse's assets, adequately safeguard these assets from dissipation and thus satisfy the Supreme Court's reason for requiring the bond. Because this Court has been charged on remand to determine the "*adequacy*" of the bond required by the Supreme Court, jurisdiction is proper here and therefore Capital Suisse requests this Court find that the bond requirement is satisfied.

ARGUMENT

I. UPON THE RETURN OF THE DOCUMENTS REMOVED FROM UTAH BY CAPITAL SUISSE, THE COURT SHOULD DECLARE THAT CAPITAL SUISSE HAS SUFFICIENTLY COMPLIED WITH ALL OUTSTANDING ORDERS OF THIS COURT.

The Supreme Court has remanded the appeal of this matter to this Court to determine whether Capital Suisse has com-

plied with all outstanding orders of this Court entered prior to appeal. As noted above, Capital Suisse's current counsel was not Capital Suisse's trial counsel. Based on a review of the record in this case made in an attempt to determine what outstanding orders of this Court exist, Capital Suisse believes that the only outstanding order from the Court that Capital Suisse has failed to comply with is the Court's March 25, 2002 Order requiring Capital Suisse to return to Utah all documents produced in the ordinary course of business in Utah that were removed by Capital Suisse during the course of this litigation. Capital Suisse has returned those documents to Utah and have been made them available to HH&C for review.

If the Court finds that there are additional outstanding orders requiring Capital Suisse's further compliance, Capital Suisse requests that the Court promptly determine what those orders are so that it may comply with the Supreme Court's instructions.

II. THE BOND REQUIRED BY THE UTAH SUPREME COURT SHOULD BE WAIVED.

As noted above, the Utah Supreme Court stated that Capital Suisse needs to post a bond in the amount determined as adequate by this Court. See Opinion at ¶ 24. While it is unclear from the Supreme Court's decision what type of bond the Court is imposing on Capital Suisse, it appears that the most closely analogous type of bond is a supersedeas bond. A supersedeas bond is defined as "[a] bond required of one who petitions to set aside a judgment or execution and from which the other party may be made whole if the action is unsuccessful." BLACK'S LAW DICTIONARY 738 (6th ed.1990). "[T]he purpose of a supersedeas bond is to protect non-appealing parties by maintaining the status quo during the appeal and insuring that those who have obtained the judgment under review will not be prejudiced by a stay of the judgment pending final determination of the appeal."

Diversified Holdings, L.C. v. Turner, 63 P.3d 686, 702 (Utah 2002).[2] Because the Supreme Court held in its decision that its requirement that Capital Suisse post a bond for any unsatisfied portion of the judgment was based on its concern that "any continued delay will lead to the further dissipation of Capital's Suisse's assets," or, in other words, to maintain the status quo, the bond required of Capital Suisse apparently is a supercedeas bond.[3]

In dealing with supersedeas bonds, courts have held that the bond may be waived if the party seeking to stay a judgment pending appeal demonstrates that it is financially impossible for it to post the bond. *See, e.g., HCB Contractors v. Rouse & Assocs.*, 168 F.R.D. 508, 512 (E.D. Pa. 1995) ("the court possesses the power to waive the requirement of a supersedeas bond"). In *Miami International Realty v. Paynter*, 807 F.2d 871 (10th Cir. 1986), a jury found Paynter, an attorney, liable for malpractice and awarded the plaintiff $2,100,000. Paynter appealed the decision and moved for a stay of execution of the judgment and a waiver of supersedeas bond. The trial court granted Paynter motion to stay and

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[2] Utah Rule of Civil Procedure 62, which governs supersedeas bonds, states in relevant part: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay, unless such a stay is otherwise prohibited by law or these rules. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court."

[3] Part of Capital Suisse's confusion as to what type of bond the Supreme Court has imposed on it is due to the fact that normally a supersedeas bond is only required when the appellant (Capital Suisse in this case) is seeking to stay enforcement of the judgment. *See Hidden Meadows Dev. Co. v. Mills*, 590 P.2d 1244, 1248 (Utah 1979) (holding that an appellant is not bound to furnish a supersedeas bond; rather, it is only necessary if the appellant wishes to restrain the judgment creditor and the lower court from taking affirmative action to enforce a judgment). Capital Suisse has not sought to stay enforcement of the judgment entered against it. *See* Gubbay Aff. at ¶ 19.

waived the supersedeas bond. The plaintiff then appealed the trial court's decision.

On appeal, the Tenth Circuit upheld the trial court's waiver of the supersedeas bond. In its decision, the Tenth Circuit noted that trial courts "have inherent discretionary authority in setting supersedeas bonds." *Id.* at 873. It then quoted the following from the Second Circuit's decision in *Texaco, Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (1986):

> A judgment creditor's primary concern when a judgment in his favor is stayed pending appeal is that he be "secure . . . from loss resulting from the stay of execution. . . ." In making that determination we look to general equitable principles. Accordingly, when setting supersedeas bonds courts seek to protect judgment creditors as fully as possible without irreparably injuring judgment debtors. . . . A full supersedeas bond may be required "where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable", whereas no bond or a reduced bond would suffice when the creditor's interest, due to unusual circumstances, would not be unduly endangered. . . .

Id., citing *Wunschel & Small, Inc., v. United States*, 554 F.Supp. 444-45 (U.S.C1.Ct.1983) (Rule 62(d) does not preclude the court from issuing a stay without a bond or upon the posting of a partial bond); *C. Albert Sauter Co. v. Richard S. Sauter Co.*, 368 F.Supp. 501, 520-21 (E.D.Pa.1973) (stay of execution granted following defendants' showing of lack of sufficient assets to satisfy the judgment or to obtain a bond in amount thereof and that execution of the judgment would place each of the defendants in insolvency).

The Tenth Circuit, having concluded that a stay of judgment could be obtained under Rule 62(d) without obtaining a

supersedeas bond where the party appealing judgment has demonstrated that posting the bond is financially impossible, held that the trial court did not err in granting Paynter's request for stay without a supersedeas bond. The court found that Paynter's motion for a stay was supported by his affidavit in which he stated that he did not have sufficient assets to post a supersedeas bond for the amount of the judgment. *See also HCB Contractors*, 168 F.R.D. at 512 (waiving requirement of supersedeas bond upon finding party lacking assets to post bond).

Here, as Mr. Gubbay's Affidavit clearly establishes, Capital Suisse is unable to post a bond for either of two independent reasons. First, Capital Suisse lacks sufficient assets to post the bond required by the Supreme Court. *See* Gubbay Aff. at ¶¶ 16, 18. In fact, several of the entities the make up Capital Suisse, including Mr. Gubbay, are each bankrupt. *See id.* at ¶¶ 12, 15. As a result, all attempts by Capital Suisse to obtain a bond have been denied. *See id.* at ¶ 16. The Court should therefore waive the bond because Capital Suisse does not have the ability to post one.

Second, even if Capital Suisse possessed sufficient assets to post the bond, the Spanish Marbella Court has entered several Precautionary Measures and Orders that freeze all of Capital Suisse's assets. The Precautionary Measures, dated July 25, 2000, May 15, 2001, and May 17, 2001, require the "freezing and preventive seizure of the balances of the bank accounts, deposits of securities, bonds, shares, public debt, contents of security boxes, or other financial assets" of Capital Suisse in all jurisdictions where Capital Suisse has assets, including Spain, Gibraltar, Amsterdam, New York and Salt Lake City. *See* Gubbay Aff. at ¶¶ 5, 6, 7 and Exhibits 1 & 2 thereto. The Spanish Marbella Court reaffirmed these Precautionary Measures in its orders dated March 6, 2002 and March 12, 2002. *See id.* at ¶¶ 8, 9. These Precautionary Measures and Orders remain in effect at the present time. *See*

id. at ¶¶ 5, 10. Because the Precautionary Measures and Orders entered by the Spanish-Marbella Court prohibit the disposal (in any form) of any of the assets of Capital Suisse, any attempt by Capital Suisse to post the bond required by the Utah Supreme Court would violate the Precautionary Measures and Orders. *See id.* at ¶ 14. For this second, independent reason, it is not possible for Capital Suisse to comply with the Supreme Court's Opinion regarding the posting of a bond.

Utah Rule of Civil Procedure 62(i)(2) provides "Upon motion and good cause shown, the court may permit a deposit of money in court or other security to be given in lieu of giving a supersedeas bond under Subdivision (d)." The Utah Court of Appeals held in *D'Aston v. D'Aston*, 790 P.2d 590 (1990), a decision relied upon heavily by the Supreme Court in its Opinion in this case, that a party seeking a stay "merely has the obligation to come forward and offer a reasonable alternative to the trial court to safeguard [its] assets from dissipation pending her appeal." *Id.* at 594. The Precautionary Measures and Order by the Spanish Marbella Court, which freeze all of Capital Suisse's assets, provide an alternative safeguard of Capital Suisse's assets from dissipation. *See Paynter*, 807 F.2d at 874 (finding trial court's order enjoining the transfer or disposing of any assets a sufficient alternative safeguard to supersedeas bond); *see also HCB Contractors*, 168 F.R.D. at 514 (holding an order restraining the transferring of judgment debtors assets sufficient alternative security to waive supersedeas bond).

The clear desired intent of the Supreme Court's requirement that Capital Suisse post a bond is to protect HH&C from any further dissipation of Capital Suisse's assets. Because Capital Suisse has very few assets, and because even what assets it has are frozen pursuant to the Spanish Court's Orders, there is no threat that Capital Suisse's assets will be dissipated pending the appeal of this matter. The Supreme Court's bond requirement is therefore unnecessary as it will provide no additional protection to HH&C in this regard.

At the time the Opinion in this case was entered, the Supreme Court had no facts before it that would allow it to know it would be impossible for Capital Suisse to post the required bond. In *In the Matter of the Discipline of Jamis M. Johnson*, 48 P.3d 881 (Utah 2002), Justice Durham argued "Where the judgment is equivalent to a professional death penalty, I believe that this court's review should precede execution." *Id.* at 887 (Durham, J., concurring and dissenting). Absent a finding by this Court that the intent of the Supreme Court's opinion has been satisfied in light of the Spanish Court's Orders, or, at a minimum waiving the requirement that Capital Suisse post a bond that it clearly cannot provide, Capital Suisse is denied due process and would, in effect, be condemned to the equivalent of the "death penalty" as any opportunity for it to have its appeal heard on the merits would be lost. The Court therefore should hold the bond required by the Supreme Court is satisfied.

CONCLUSION

For the reasons set forth above, the Court should find that the remaining outstanding order which Capital Suisse must comply with is this Court's Order requiring Capital Suisse to return all documents it removed from Utah during the course of this litigation and that Capital Suisse has complied with that Order. The Court should also hold that the bond required by the Supreme Court in its Opinion has been satisfied.

DATED this 3rd day of September, 2004.

HATCH, JAMES & DODGE

By: /s/ Brent O. Hatch
BRENT O. HATCH
MARK H. RICHARDS

Attorneys on Appeal for Defendants